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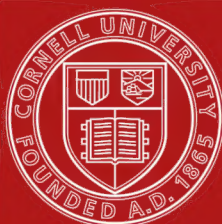
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A

PRACTICAL TREATISE

ON THE LAW RELATING TO

THE SPECIFIC PERFORMANCE

OF

CONTRACTS.

BY

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COUNSELLOR-AT-LAW.



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PREFACE.

A LONG while ago the publishers of these pages entered into an engagement with a prominent member of the bar to write a treatise on the Specific Performance of Contracts, but his subsequent call to a different field of labor compelled him to relinquish the undertaking, and the author then, by request, took it up. At that time this important subject had not been separately treated by any American writer; and, though it occupied a place in books on the general system of Equity Jurisprudence, yet, to obtain detailed information in relation to it, resort was necessarily had to English works, which, of course, did not always present the law relating to the specific enforcement of contracts precisely as it is administered by the courts of this country. The reports of every State in the Union bear abundant testimony to the practical nature and frequent recurrence between litigants of the topics herein discussed; and it is the object of the present volume to give the result of our legal decisions in connection with those of Great Britain in establishing rules governing such suits.

In the treatment of the subject the prominent endeavor has been to present practical considerations, rather than such as are merely theoretical or speculative, and to avoid complexity; the further aim being at precision and clearness of language, and simplicity and convenience of arrangement. A general statement of a principle is followed by examples in the form of a concise and brief outline of legal decisions sustaining the proposition, which experience has shown is more satisfactory than the authoritative enunciation of the author simply sustained by citations, especially to lawyers who do not at all times have access to extensive libraries. With some modifications the arrangement is similar to

that of Mr. Fry's admirable work on Specific Performance, which is simple and practical—that is, the treatise is divided into four books, as follows: 1st, *Of the Jurisdiction*; 2d, *The Mode of Exercising the Jurisdiction*; 3d, *Defences*; 4th, *Matters Incident to the Jurisdiction*. Book I. embraces the definition and nature of the subject, and a general enumeration of the contracts which are capable of being specifically enforced; Book II., the parties to the suit, pleadings, injunction, and writ of *ne exeat*; Book III., the several grounds on which a decree may be successfully resisted; Book IV., compensation and damages. A great variety of questions, many of them deeply interesting, are treated in the text, and it is believed that they involve all of the general principles appertaining to this particular branch of the law. The citations from both the English and American reports, from the earliest period to a date near the time of publication, are numerous, and designed to embrace all the decisions required for the most ample illustration. The notes, which have been prepared with care, and which it is hoped will be found serviceable, give explanations and facts in detail which could not with propriety be introduced in the text. Extracts from judicial opinions are seldom given in the text, and never at any great length; but such as were thought to be important will be found in the notes. To facilitate reference, besides the sub-divisions placed at the commencement of the chapters, each section has a special heading, and there is a full index. The author has given to the work a great deal of time and study, and he trusts that it may be found of practical utility.

BINGHAMTON, N. Y., *April* 30, 1881.

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THE SPECIFIC PERFORMANCE OF CONTRACTS.

BOOK I. OF THE JURISDICTION.

CHAPTER I.

DEFINITION AND NATURE.

1. Meaning and object.
2. Advantages.
3. Origin.
4. Extent.
5. Right of party complaining of breach of contract.
6. Discretion of court.

§ 1. *What meant by, and ground of.*—Specific performance, as applied to contracts, has been defined, “The actual accomplishment of a contract by the party bound to fulfil it.”¹ “Performance of a contract in the precise terms agreed upon; strict performance.”² But as the exact fulfilment of an agreement, according to its letter, by the party, is not always practicable, the phrase may mean, in a given case, not literal, but substantial performance; or such a performance as will do justice between the parties under the circumstances, with compensation to the other party when that is required.³ A main ground of the jurisdiction of courts of equity in specific performance, is that they

¹ Bouv. L. Dict.

² Burrill's L. Dict.

³ The term specific performance, when applied to a partial fulfilment, with compensation for the deficiency, is, of course, used in a qualified sense, as meaning the best performance attainable under the circumstances.

are capable of affording relief not obtainable at law; the latter requiring the plaintiff to show precision, on his part, in complying with all the terms of the agreement; while the former sometimes relieve, notwithstanding defects or failure to perform at the day. So a court of equity, having regard to the substance of the agreement and the object and intention of the parties, will not permit terms that are not essential to be set up as a reason for refusing to fulfil. And although the legal remedy may have been lost by the default of the plaintiff, yet a court of equity will enforce the agreement if it is conscientious that it should be performed:—as where the plaintiff has fulfilled on his part substantially, but not so completely as to be in a position to claim performance at law.¹ On the other hand, if the party seeking relief has already obtained substantially what he intended to get under the agreement, equity will not only not compel a formal performance, but will restrain an attempt to recover damages at law for non-performance.

§ 2. *Benefit of remedy.*—The remedy of specific performance is no less reasonable than beneficial. It is an obvious principle of justice that an agreement, fairly and properly entered into, should not be evaded or violated; and that the party injured by its non-performance ought to obtain some form of redress. As the end of every contract is the accomplishment of the thing stipulated, the most direct and effectual remedy would seem to be the compelling the fulfilment of the promise. Cases often arise in which there can be no equivalent for non-performance. Real estate, from its location, or some other circumstance, may be a peculiar object of desire to a purchaser far beyond its market value; and the same may be true of personal property, so that the failure to obtain either might not be adequately compensated in money. If the con-

¹ *Davis v. Hone*, 2 Sch. & Lef., 341. Courts of law, unless specially authorized by statute, do not, as a rule, enforce the performance of contracts, but only award damages for their breach. See *McLane v. Elmer*, 4 Ind., 239.

tract, from want of skill or mistake in drawing it, or for any other cause, does not express the intentions of the parties, the writing, though executed, may leave the real agreement as inoperative as if one of the parties had refused altogether to execute it. A court of equity will, in the exercise of its acknowledged jurisdiction, afford relief as well in one case as the other, by compelling the delinquent party fully to perform his agreement according to the terms of it and the manifest intention.¹ At common law, the courts, though recognizing the obligation of the parties to a contract to perform their respective parts, can in general only enforce this obligation by way of damages.² "The common law treats as universal a proposition which is for the most part, but not universally, true, namely, that money is a measure of every loss. The defect of justice which arises from this universality of the legal principle, is met and remedied by the jurisdiction of courts of equity to compel specific performance."³ Moreover, there are cases in which there is no remedy whatever at law, for the reason that the law regards the contract as void; while equity considers it binding in conscience, and, therefore, entitled to specific enforcement. So, the contract may be one affirmative performance of which cannot be had even in equity, but which equity will enforce negatively by an injunction restraining the defendant from violating his agreement.⁴

§ 3. *When it originated.*—The inadequacy of the remedy at law gave rise to the jurisdiction of equity, which was invoked for the specific performance of contracts at a

¹ Hunt v. Rousmanier, 1 Peters S. C., 1, 14. A court of equity will not carry out the legal intention and effect of a contract in every case, but only when it is strictly equitable to do so. Canterbury Aqueduct Co. v. Ensworth, 22 Conn., 608; Backus' Appeal, 58 Pa. St., 186.

² Smith on Contr., 296; Harnett v. Yielding, 2 Sch. & Lef., 586; Tasker v. Small, 3 M. & C., 63.

³ Fry on Specif. Perform., p. 6.

⁴ As the grounds and scope of the jurisdiction of equity in the specific enforcement of contracts will fully appear in subsequent chapters, we refrain from extended comment here.

very early date. A case is reported in the Year Book 3, Edward IV., in which it was said by counsel, "If I promise to build a house for you, if I do not build it, you shall have a remedy by subpœna." To which the chancellor is reported to have answered, "He shall." In the twenty-first of Henry VII., Chief Justice Pinneux, speaking of the remedies for the non-performance of contracts, says: "If a man bargain with another that he shall have his land for ten pounds, and that he will make him an estate therein, by such a day, and he do not make the estate, an action upon the case lies; but it is to be observed, *in that*, he shall only recover damages. But by subpœna, the chancellor may compel him to execute the estate, or imprison him." The jurisdiction of equity in this regard was, however, questioned so late as the fourteenth of James I.; though, at that period, Lord Ellesmere stated that when the law could not give a lease, or a thing promised, but damages, there was some cause to compel the party to perform the thing promised.¹ In the second of Charles I., such suits had become common; and the Court of Queen's Bench refused to grant a prohibition against a suit for a specific performance, because the plaintiff could not sue at law to assure land, but only to recover damages.² The jurisdiction in time became so well established that it was said by Sir William Grant, that, supposing the contract to have been entered into by a competent party, and to be in the nature and circumstances of it unobjectionable, it was as much of course in chancery to decree a specific performance, as to give damages at law.³

§ 4. *Power of court.*—A court of equity may enforce or set aside a contract for land, enforce a lien, or exercise jurisdiction where a legal remedy is obstructed;⁴ and compel

¹ Story's Eq. Juris., Sec. 716, *note*.

² Fitz. Abr. Tit. subpœna, pl. 7.

³ Powell on Contr., pp. 5, 6; Tothill, 229.

⁴ Molineux's Case Latch, 172.

⁵ Hall v. Warren, 9 Ves., 608.

⁶ Davis v. Hall, 4 T. B. Mon., 23; Cummings v. Coe, 10 Cal., 529.

deeds of confirmation to be made and possession to be given by a party, through whom the title to land is obtained, where the deeds are lost or not recorded.¹ It will often decline to interfere to enable a party to acquire possession of property, when nevertheless it will refuse to disturb the possession where it has been obtained without its agency.² On the other hand, if a court of equity has properly acquired jurisdiction, it will retain the case, and settle matters between the parties which do not afford original ground of jurisdiction.³ Whether the fact that the plaintiff has a remedy by mandamus will exclude the jurisdiction of equity is unsettled.⁴

§ 5. *Choice of remedies.*—Although, upon the breach of a contract for the sale and purchase of real estate, the person injured thereby may, in general, sue either for specific performance or damages, yet he cannot obtain both in relation to the same transaction; and if he proceed for both, the court will compel him to elect.⁵ When a suit is entertained for specific performance, the court will in general

¹ *Blight v. Banks*, 6 T. B. Mon., 152. Where a deed has been lost or destroyed without the fault of the grantee before being placed upon record, the grantor may be compelled to make a second deed in place of the first, after a demand and refusal or failure to comply; *Conlin v. Ryan*, 47 Cal., 71. An action for the specific performance of a contract to convey land is not in all cases beyond the jurisdiction of courts prohibited from entertaining actions in which the title to land comes in question. In such a case the question of title may not be raised; *Lindeman v. Rinker*, 42 Ind., 223.

² *Crane v. Gough*, 4 Md., 316.

³ *Brooks v. Stoley*, 3 McLean, 523; *Pearson v. Darrington*, 21 Ala., 169; *Martin v. Tidwell*, 36 Ga., 332; *Franklin Ins. Co. v. McCrea*, 4 Greene Iowa, 229; *Handley v. Fitzburgh*, 1 A. K. Marsh, 24; *State v. McKay*, 43 Mo., 594; *Armstrong v. Gilchrist*, 2 Johns Ch., 424, 431; *Louder's Appeal*, 57 Pa. St., 498.

⁴ 1 Sug. V. & P., 8th Am. Ed., 79, 81.

⁵ 1 Danl. Ch. Pr., 4th Am. Ed., 815; *Royle v. Wynne*, Cr. & Ph., 252; *Haywood v. Covington*, 4 Leigh, 373; *Long v. Colston*, 1 Hen. & Munf., 111. Where in an action by the vendors of real property against the purchaser for damages for the nonfulfilment of the contract, the right to recover was not established, on the trial before the court without a jury, it was held that a judgment for specific performance could not be granted, although the evidence was sufficient to warrant such a suit; *Towle v. Jones*, 19 Abb. Pr., 449; *S. P. Cowenhoren v. City of Brooklyn*, 38 Barb., 9. The recovery of damages in an action for the breach of a covenant to grade, inclose, and improve land sold for a public square, is not a bar to a subsequent suit for specific performance of a covenant to keep the premises forever open as a public square; *Stuyvesant v. Mayor*, etc., of N. Y., 11 Paige Ch., 414.

stay any other action for the same cause by either party.¹ But a person may be entitled to damages for violations of the contract up to the time of bringing the suit, with specific performance for the future ; or, to specific performance generally, and damages for acts which do not admit of a decree for specific performance.² Where, therefore, in a contract to take a lease for a certain term, the lessee agreed to tear down a house on the premises and erect a new one, it was held that the lessor might obtain specific performance as to the lease, and damages for not building the house ; the court not having power to decree specific performance as to the latter.³

§ 6. *Relief in what sense discretionary.*—The granting or withholding of a decree for specific performance is said by all of the authorities, when speaking of the remedy, to be in the discretion of the court ;⁴ neither party to a con-

¹ Duke of Beaufort v. Glynn, 3 Sm. & G., 226 ; Fennings v. Humphery, 4 Beav., 6 ; Sainter v. Ferguson, 1 Mac. & G., 286.

² Fennings v. Humphery, *supra*.

³ Soames v. Edge, Johns, 669. See Mayor of London v. Southgate, 38 L. J. C., 141. In England, the rule that if the plaintiff fails in his suit for specific performance, courts of equity will not in general entertain the question of damages, but will leave him to his remedy at law, was changed by the Chancery Amendment Act of 1858 (Lord Cairns' act), 21, 22 Vict. Ch., 27. See *post*, § 518. Section 3 of the act provides for having the damages assessed by a jury. By the Judicature Act of 1873, the court may give either remedy as the case may require. Where, in a suit before a colonial court which administered both law and equity, the bill was not properly framed for specific performance, it was held that the court had power to amend the bill and give damages ; Larios v. Gurety, L. R. 5, P. C. 346. Under Lord Cairns' act the court cannot give damages unless it has original jurisdiction for specific performance : Crampton v. Varna R.R., L. R. 7, Ch. 567 ; as where a purchaser is entitled to damages for breach of the contract, but, owing to defect in the title or other default of the vendor, specific performance cannot be obtained ; Howe v. Hunt, 31 Beav., 420 ; Lewers v. Earl of Shaftesbury, L. R. 2, Eq. 270 ; Ferguson v. Wilson, L. R. 2, Ch. 77 ; or where the injury is small or temporary and capable of compensation in damages, and an injunction will be very detrimental to the defendant ; Aynsley v. Glover, L. R. 18, Eq. 555 ; Leader v. Moody, L. R. 20, Eq. 143. Where a railroad company, in purchasing land, agreed with the vendor to construct a station upon it, and the station was afterward located elsewhere, it was held that as the agreement was uncertain as to the use of the station, it was a case for damages instead of specific performance ; but that in assessing the damages every presumption was to be made in favor of the plaintiff as to the extent of the injury ; Wilson v. Northampton & Banburg R.R., L. R. 9, Ch. 279.

⁴ Pyrke v. Waddington, 10 Hare, 1 ; Cox v. Middleton, 2 Drew, 209 ; Bennett v. Smith, 16 Jur., 422 ; Watson v. Marston, 4 De G. M. & G., 230 ; Waters v. Howard, 1 Md. Ch., 112 ; Blackwilder v. Loveless, 21 Ala., 371 ; Hudson v. Layton, 5 Harring., 74 ; Young v. Daniels, 2 Iowa, 126 ; Rudolph v. Covell, 5

tract being entitled to the relief as a matter of right.¹ By this is meant, not the exercise of an arbitrary and capricious will governed by the mere pleasure of the court, but, as compared with the absolute right of a party to a judgment at law for damages upon the breach of a contract, a sound judicial discretion, controlled by fixed rules and principles, in view of the special features and incidents of each case. When a contract concerning real estate is valid, unobjectionable in its nature and in the circumstances connected with it, and capable of being enforced, and it is just and proper that it should be fulfilled, it is as much a matter of course for a court of equity to decree a specific performance as for a court of law to give damages for the breach of it.² 'In exercising its discretionary power, the court will act with more freedom than when exercising its ordinary powers, and will grant or withhold relief according to the case presented.'³ "In every case the question

Ib., 126; *Auter v. Miller*, 18 *Ib.*, 405; *Waters v. Howard*, 8 *Gill*, 262; *Smoot v. Rea*, 19 *Md.*, 398; *Hester v. Hooker*, 7 *Sm. & Marsh*, 768; *Tobey v. County of Bristol*, 3 *Story*, 800; *Pickering v. Pickering*, 38 *N. H.*, 400; *Humbard v. Humbard*, 3 *Head, Tenn.*, 100; *Scott v. Whitlow*, 20 *Ill.*, 310; *Doyle v. Harris*, 11 *R. I.*, 539.

¹ *McComas v. Easley*, 21 *Gratt.*, 23; *Hale v. Wilkinson*, *Ib.*, 75, but a right to maintain a suit for specific performance accrues upon the refusal of the vendor to fulfil as required by the terms of the contract; *Peters v. Delaplaine*, 49 *N. Y.*, 362; *Beach v. Dyer*, 93 *Ill.*, 295.

² *Hall v. Warren*, 9 *Ves.*, 608; *Haywood v. Cope*, 25 *Beav.*, 140; *Rogers v. Saunders*, 16 *Me.*, 92; *Griffith v. Frederick County Bank*, 6 *Gill and John.*, 424; *Pigg v. Corder*, 12 *Leigh.*, 69; *Meeker v. Meeker*, 16 *Conn.*, 403; *Seymour v. Delancey*, 3 *Cow.*, 445; 6 *Johns. Ch.*, 222; *King v. Morford*, 1 *N. J. Eq.*, 274; *Plummer v. Keppler*, 26 *Ib.*, 481; *Anthony v. Leftwich*, 3 *Rand., Va.*, 238; *Prater v. Miller*, 3 *Hawks.*, 629; *Turner v. Clay*, 3 *Bibb.*, 52; *Frisby v. Balance*, 4 *Scam.*, 287; *Broadwell v. Broadwell*, 6 *Ill.*, 599; *McMurtrie v. Bennett, Harr., Mich.*, 124; *Dougherty v. Hamston*, 2 *Blackf.*, 273; *St. John v. Benedict*, 6 *Johns. Ch.*, 111; *McWhorter v. McMahan*, 1 *Clark, N. Y.*, 400; *Henderson v. Hayes*, 2 *Watts*, 148; *Perkins v. Wright*, 3 *Har. & Mchen.*, 324; *Leigh v. Crump*, 1 *Ired. Eq.*, 299; *Gould v. Womack*, 2 *Ala.*, 83; *Pulliam v. Owen*, 25 *Ib.*, 493; *Ash v. Daggy*, 6 *Ind.*, 259; *Howard v. Moore*, 4 *Sneed*, 317; *Minturn v. Seymour*, 4 *Johns. Ch.*, 497; *Jackson v. Ashton*, 11 *Pet.*, 229; *Bowen v. Irish*, 6 *Bosw.*, 245; *Lowry v. Buffington*, 6 *W. Va.*, 249; *Abbott v. L'Hommedieu*, 10 *Ib.*, 677; *Stearns v. Beckham*, 31 *Gratt.*, 379; *Home Manuf. Co. v. Chicago, L. J.*, 119. See *post*, §§ 11, 170, *note 1*.

³ *Tyson v. Watts*, 1 *Md. Ch.*, 13; *Fish v. Lightner*, 44 *Mo.*, 268; *Hudson v. King*, 2 *Heisk., Tenn.*, 560; *Quinn v. Roath*, 37 *Conn.*, 16; *Higginbottom v. Short*, 25 *Miss.*, 160; *Iglehart v. Vail*, 75 *Ill.*, 63, and see *Sweeney v. O'Hara*, *Ib.*, 34; *Willard v. Tayloe*, 8 *Wall*, 557; *Marble Co. v. Ripley*, 10 *Ib.*, 339; *Bogan v. Daughdrill*, 51 *Ala.*, 312; *Daniel v. Fraser*, 40 *Miss.*, 507; *Snell v.*

must be whether the exercise of the power of the court is demanded to subserve the ends of justice; and, unless the court is satisfied that it is right in every respect, it refuses to interfere."¹ A valuable consideration, particularity, certainty, mutuality, and a necessity for performance are requisites upon which the equity of a case arises.² Equity may refuse to decree the specific performance of a contract which it would not set aside if executed.³

Mitchell, 65 Me., 48; St. Paul Division v. Brown, 9 Minn., 157. Specific performance will be refused in all cases when it is clearly inequitable to grant it. Munch v. Shabel, 37 Mich., 166. See *post*, § 109.

¹ Stewart, J., in O'Brien v. Pentz, 48 Md., 562.

² Aston v. Robinson, 49 Miss., 348. For a consideration of the principles which govern courts in granting relief by decreeing the specific performance of contracts, see Willard v. Tayloe, 8 Wall, 557. The equity jurisdiction of the United States courts is derived from the Constitution and laws of the United States, and their power and rules of decision are the same in all the States. Noonan v. Lee, 2 Black, 499. Under the revised statutes of Maine, ch. 9, p. 10, a court of equity may hear and determine "all suits to compel the specific performance of contracts in writing when the parties have not a plain and adequate remedy at law." But the contract must be in force as such. If judgment has been obtained thereon, it is no longer a contract in writing within the provisions of the statute, but is merged in the judgment. If judgment has been entered upon the contract in favor of the plaintiff, he has a sufficient remedy at law; and, with few exceptions, where the contract has reference to personalty and not realty, the proper remedy is at law, and a court of equity will not aid in enforcing the provisions of it. Babier v. Babier, 24 Me., 42. An action to enforce specific performance of a written contract in Massachusetts under the Act of 1853, ch. 371, should be at law, praying relief in equity. Darling v. Roarty, 5 Gray, 71. It is too late, after the testimony in the cause is all in, to object to the jurisdiction of the court on the ground that the complainant has an adequate remedy at law. Cumming v. Mayor, etc., of Brooklyn, 11 Paige Ch., 596.

³ Clitherall v. Ogilvie, 1 Dessaus Eq., 250; Barksdale v. Payne Riley, S. C. Ch., 174; Jackson v. Ashton, 11 Pet., 229; Seymour v. Delancey, 3 Cowen, 445; 6 Johns. Ch., 222.

CHAPTER II.

CONTRACTS WHICH MAY OR MAY NOT BE SUBJECTS OF THE JURISDICTION.

7. Insufficiency of remedy at law.
8. Former rule that legal right must first be established.
9. There must be no remedy at law.
10. Not an objection that there is a possible legal remedy.
11. What contracts enforced.
12. Ground for enforcement of contract.
13. Must be a right of action.
14. Most frequent exercise of jurisdiction.
15. Inadequacy of vendor's legal remedy.
16. Rule in respect to personal property.
17. Jurisdiction as to goods when remedy at law is insufficient.
18. Where personal property has a peculiar value.
19. Contracts for the sale of stock.
20. Sale of debt or agreement to give security therefor.
21. Where performance is secured by a penalty.
22. In case of stipulation for payment of liquidated damages.
23. Option of party to do the act or pay a certain sum.
24. Stipulation in lease to pay increased rent.
25. When sum reserved, regarded as a penalty.
26. Stipulations enforced by injunction.
27. Building contracts not in general enforced.
28. When specific performance of a contract to build decreed.
29. Distinction between a contract to build and a contract of sale, with a stipulation to erect a building.
30. Exception to rule as to building contracts.
31. Covenants to repair not in general enforced.
32. Contract to insure enforced.
33. Contracts of hiring and service not enforced.
34. Specific performance of revocable contract not decreed.
35. Rule as to contracts for sale of good-will of business.
36. Specific performance of covenant to renew lease.
37. Validity of a contract in relation to an expectancy.
38. Contracts concerning expectancies enforced with caution.
39. Contract as to expectancy to be enforced during life of party.
40. Defective conveyances by parents aided.
41. Validity of agreement as to disposition of property by will.
42. Agreement for separation of wife enforced.
43. Specific performance of compromise.
44. Agreement to arbitrate not enforced.
45. Specific performance of award.
46. When equity will not enforce an award.
47. Value ascertained by court under agreement to arbitrate.
48. Enforcement of contracts entered into abroad.
49. Contracts which the court has no power to enforce.

§ 7. *Absence or uncertainty of legal remedy.*—A contract may be such as by reason of its subject matter, the

parties to it or its form confers no right to recover damages at law, but the evasion of which would violate a moral and equitable duty. Thus, although an action could not be maintained on a contract to execute a conveyance by a particular day, which was rendered impossible by the death of the contracting party previous to the day, yet specific performance would be decreed against the heir.¹ So, specific performance of an agreement may be enforced, although no injury has been sustained, but is only anticipated ;² as, where a surety on a bond, by a bill in equity, compels the obligor to pay the debt, although the surety has not been sued.³ Again, a contract may be enforced in equity the non-performance of which might have been compensated in damages, when, owing to peculiar circumstances, the remedy at law is not available. Accordingly, where a contract for the purchase of standing timber was embraced in a preliminary memorandum, and no articles were afterward drawn, so that it was doubtful whether the agreement in its existing shape might not be regarded at law as too incomplete to afford any remedy there, it was held that the contract was one which equity would specifically enforce.⁴ So, a contract to purchase a debt was enforced on the ground that the debt had not been so assigned as to enable the plaintiff successfully to sue at law.⁵ And where the contract was for the purchase of Government stock, the fact that the plaintiff was not the original holder of the scrip, but only the bearer, which rendered it doubtful whether he could maintain an action at law upon the contract, was held to give the court jurisdiction.⁶

¹ 1 Mad. Ch., 362; *Milnes v. Gery*, 14 Ves., 403. Where another instrument is required to carry out the agreement of the parties, specific performance will be decreed in that respect. *Fenner v. Hepburn*, 2 Yo. & Col. C. C., 159; *Avary v. Longford Kay*, 663; *South Wales R.R. Co. v. Wythes*, 1 K. & J., 186; *Affid. 5 De G. M. & G.*, 880; *Pollard v. Clayton*, 1 K. & J., 462.

² 1 Mad. Ch., 178; *Mitf. Eq. Pl. by Jeremy*, 148.

³ *Hayes v. Ward*, 4 Johns. Ch., 132.

⁴ *Buxton v. Lister*, 3 Atk., 383.

⁵ *Wright v. Bell*, 5 Pri., 325.

⁶ *Doloret v. Rothschild*, 1 Sim. and Stu., 590.

§ 8. *Establishing right at law.*—It is said that it was formerly the practice to send the parties to law, and to entertain the suit only in case the plaintiff recovered damages there.¹ According to Mr. Butler, as the plaintiff was thus subjected to the expense of two suits, the action at law was afterward dispensed with when the want or inadequacy of the legal remedy was evident.² Lord Macclesfield asserted that “it is not a true bill, that, where an action cannot be brought at law on an agreement for damages, a suit in equity will not lie for a specific performance.” In the case before him,³ a feme sole had given a bond to her intended husband, that, in case of their marriage, she would convey her lands to him in fee. The wife died without issue, and afterward the husband also died. It was held that although the bond was void at law, yet it was good evidence of an agreement, and that the heir of the husband was entitled to specific performance against the heir of the wife. Mr. Story thinks it doubtful whether such a rule could ever have been generally applied, and that it was probably confined to cases in which the party was not entitled to any remedy at law, and there was no equity to be administered beyond the law.⁴ Where equity interferes to enforce a contract, in order to avoid a multiplicity of suits, the plaintiff, as a general rule, must first establish his right at law.⁵ But, at the present day, there

¹ Dodsley v. Kinnersley, Ambl., 406; Bettesworth v. Dean & Chapter of St. Paul's, Sel. Cha. Cas., 67, 69. The latter case was decided in 1726. A lease had been granted by the defendants before the disabling statute of 13 Eliz., with the covenant to renew for ninety-nine years, and the plaintiff sought a renewal for the term allowed by the statute, which the court refused on the ground that no action could have been maintained on the covenant after the passing of the statute. Lord Ch. J. Raymond said: “I take this to be a certain clear rule of equity, that a specific performance shall never be compelled for the not doing of which the law would not give damages. The covenant to oblige them to make a lease for ninety-nine years is gone, and damages cannot be recovered for part of a covenant, and I am therefore of opinion that equity cannot interfere.” This decision was, however, reversed in the House of Lords.

² Butler's Reminis., 39, 40.

³ Cannel v. Buckle, 2 P. Wms., 244.

⁴ Story's Eq. Juris. Sec., 739.

⁵ Pennsylvania Co. v. Delaware Co., 31 N. Y., 91.

are many cases in which specific performance is decreed where no action on the contract for damages could have been maintained.¹

§ 9. *When there is a remedy at law, equity will not interfere.*—A court of equity will not grant relief where the complaining party will not be deprived of any legal right by withholding it, unless he can show clearly that he is entitled to the relief sought.² If the plaintiff has an adequate remedy at law, he must seek his redress there.³ Where the city of New Haven agreed to purchase of the plaintiff certain lands, and sufficient water of Mill River to supply the city, and covenanted to construct a dam and canal to convey the surplus water for the vendor's use: a bill filed by him to enforce specific performance was dismissed.⁴ Equity has no jurisdiction of a suit to recover

¹ See *Tevis v. Richardson*, 7 T. B. Mon., 654; *Allen v. Beal*, 3 A. K. Marsh, 554. The maxim that equity will not decree the specific performance of a contract upon which an action at law for damages will not lie, only means such a contract as the law would have recognized if sued in proper time and under proper circumstances. *White v. Butcher*, 6 Jones Eq., 231. On a verbal contract for the sale of land, made before the statute of frauds went into operation, the court denied relief on the ground that an action could only have been maintained at law for a breach of the contract, and that such action was barred by the statute of limitations. *Smith v. Carney*, 1 Litt., Ky., 295.

² *Parish v. Oldham*, 3 J. J. Marsh, 544.

³ *Coombe v. Meade*, 2 Cranch, C. C., 547; *Drew v. Haynes*, 8 Ala., 438; *Field v. Jones*, 10 Ga., 229; *Ross v. Buchanan*, 13 Ill., 55; *Kyle v. Frost*, 29 Ind., 382; *Smith v. Short*, 11 Iowa, 523; *Clayton v. Carey*, 4 Md., 26; *Bonebright v. Pease*, 3 Mich., 318; *Redmond v. Dickerson*, 9 N. J., 507; *Phyfe v. Wardell*, 2 Edw. Ch., 47; *Murdock v. Anderson*, 4 Jones, Eq., 77; *Peeler v. Levy*, 26 N. J., Eq., 330; *Marble Co. v. Ripley*, 10 Wall, 339; *Richmond v. Du-buque*, etc., R.R. Co., 33 Iowa, 422; *Decks' Appeal*, 57 Pa. St., 467; *Barnes v. Barnes*, 65 N. C., 261; *Noyes v. Marsh*, 123 Mass., 286. At a sheriff's sale of land, the purchaser refused to take the property, and it was resold for less money. It was held that as there was a sufficient remedy under the statute, the court would not entertain jurisdiction to compel specific performance by the first purchaser. *Orr v. Brown*, 5 Ga., 400. In Massachusetts, under the statute conferring upon the court jurisdiction in equity to hear and determine suits for the specific performance of written contracts, "when the parties have not a plain, adequate, and complete remedy at common law," Genl. Sts., Ch. 113, Sec. 2, it was held that specific performance could not be granted where at the time the bill was filed the only obligation on the part of the defendant to be enforced, was his express promise to pay a definite sum of money as an instalment. *Jones v. Newhall*, 115 Mass., 244. See *post*, Sec. 15.

⁴ *Whitney v. New Haven*, 23 Conn., 624. In this case, it was held that, as the contract remained unexecuted and had been abandoned by the purchaser, there was a remedy at law in damages. *Quere*, whether it might not also have

the value of a supposed interest in certain property upon an alleged contract of the defendant to pay the same to the plaintiff.¹ So, if a purchaser of land has taken a conveyance, and there is no fraud in the transaction, and he is afterward evicted for want of title, he has no remedy in equity, but is left to the covenants in his deed.² Where in a suit to compel specific performance of an agreement to convey land, the defendant showed that the title had never been in him, and that performance had been impossible, and the judge at special term, against the defendant's objection, sent the case to a referee, it was held that the judge should have declined to proceed with the trial, and should have sent the case to the circuit; the defendant having a right to have the damages determined by a jury, of which he could not be deprived.³ Where specific performance was sought of an agreement to grant a right of way for a railroad for a term of sixty years, and, between the filing of the bill and the hearing, the company had obtained power by statute to take the land in fee; the vice-chancellor considered this a strong reason for denying the relief asked.⁴ And where the benefit of an agreement might be obtained by an account of profits and payment of the amount found due, and the amount could be recovered at law, the court refused to interfere.⁵

§ 10. *Possibility of legal remedy.*—The fact that the complainant has a possible remedy at law, will not defeat the jurisdiction of equity, especially where such legal remedy has been rendered doubtful by the fraud of the defendant.⁶ An agreement between the holder of a first, and the holder of a second mortgage, that the latter shall foreclose, and, if

been objected to the maintenance of a suit in equity, that the relief asked required of the court a superintendence of the construction of works of a special character, and to see that they were adequate to meet all the requirements of the contract.

¹ Stewart v. Mumford, 80 Ill., 192.

² Middlekauff v. Barrick, 4 Gill, 290.

³ Stevenson v. Buxton, 37 Barb., 13.

⁴ Meynell v. Surtees, 3 Sm. & Gif., 101.

⁵ Ord v. Johnston, 1 Jur., N. S., 1063.

⁶ Richardson v. Brooks, 52 Miss., 118.

he buys at the sale, pay the holder of the first mortgage a certain sum, is capable of being specifically enforced.¹ Specific performance may be decreed of an agreement notwithstanding the plaintiff has a concurrent remedy in damages, or has entered into a negotiation for a money consideration which has failed.²

§ 11. *Contracts which will be enforced.*—Every contract the subject of which is susceptible of substantial enjoyment, should be enforced, provided always, the circumstances surrounding and connected with the contract bring it within the rules entitling the party to equitable relief.³ In such case a court of equity will decree specific performance, as a matter of course, where the contract is in writing, is fair and certain, is upon an adequate consideration, and is capable of being enforced.⁴ For this purpose, any written instrument for the transfer of property, the terms of which are proper, and the meaning clearly ascertainable, but where something is omitted necessary to give it validity at law, will be regarded as a contract, or as evidence of a contract, when no injustice will be done to innocent third persons by its enforcement.⁵ A. and B., who were joint owners of real estate in equal moieties, entered into an agreement in writing, that if either party should wish to

¹ Livingston v. Painter, 19 Abb. Pr., 28; 28 How. Pr., 517; 43 Barb., 270. In this case, the holder of the second mortgage agreed that if he bought "in his own name or otherwise," at the sale under the foreclosure of his mortgage, he would reduce the principal sum secured by the first mortgage, by paying, on account of the same, three thousand dollars, and also arrears of interest; the holder of the latter agreeing to waive his right to foreclose for the whole principal and interest. Under the foregoing agreement, the plaintiff could not recover at law anything beyond nominal damages, without showing that his mortgage had been foreclosed for the whole principal, and that the mortgaged premises did not bring sufficient to pay the mortgage.

² Greene v. Westcheshire R.R. Co., L. R. 13, Eq. 44.

³ Johnson v. Rickett, 5 Cal., 218; Bruck v. Tucker, 42 Ib., 347.

⁴ Chance v. Beall, 20 Ga., 143; Rogers v. Saunders, 16 Me., 92; Hopper v. Hopper, 16 N. J., Eq., 147; *ante*, § 6.

⁵ Tierman v. Poor, 1 Gill & Johns, 216. A valid contract between plaintiff and defendant, accompanied by defendant's tender of performance, constitutes a good cause of action in equity for a specific performance; and under the New York code, is such a cause of action as can be set up as a defence in another action. Kelly v. Dee, 2 Thomp. & Cook, 286.

sell the property, he should fix a price which he would be willing to give or take, and if not acceded to by the other, a sale of the whole should be made upon the best terms that could be obtained. On the death of either party, his executors or administrators were to carry out the agreement. A. died leaving a widow and infant children, and by his will appointed his widow executrix, but forbid her to sell the land. The land was sold at public auction, on terms satisfactory to A.'s representatives, and beneficial to the children; and it was held that a decree enforcing the sale, passed the title of the infants.¹

§ 12. *When specific performance decreed.*—It is a sufficient ground for the enforcement of a contract in *specie*, that the ends of justice can alone be thereby subserved.² A. devised his real estate to B., and gave him the use of his personal property for three years, when the latter was to be divided, undiminished, among A.'s children. The debts of the testator were to be paid out of the profits of the whole estate for three years, if sufficient; if not, the deficiency was to be supplied from the lands, and the portion remaining was to be held in tail. The income of the estate for three years was not enough to pay the debts, and B. contracted to sell certain lands to C. for that purpose, but died without giving a deed. A conveyance by B.'s heirs, and a release of dower by the widow, was decreed in favor of C., on payment of the purchase money.³

§ 13. *Equity will not create a right of action.*—But the rule which requires a plaintiff to show a present subsisting right of action is equally regarded in equity as at law. Although a court of equity will supply a remedy where none exists at law, yet it will not create a right of action where

¹ Goddin v. Vagn, 14 Gratt., 102.

² Skinner v. Morris Canal & Banking Co., 27 N. J. Eq., 364. A court of equity has jurisdiction to interfere and prevent the improper diversion of a specific fund devoted to a particular use, whenever such interference becomes necessary to prevent a great or irreparable injury, or to avoid a multiplicity of suits. Farmer v. Vollentine, 7 Nebr., 498.

³ Campbell v. Digges, 4 Har. & McHen., 12.

the law gives none.¹ Where upon the dissolution of a partnership, one partner gave to the other a bond of indemnity against the debts of the concern, and the principal debtor died insolvent, whereupon the obligee filed a bill against the sureties for a specific performance of the contract, and it was not alleged that the complainant had yet sustained any damage on account of the alleged default, and, as upon the happening of such a contingency, there would be an adequate remedy at law, it was held on demurrer, that the court could not enforce such a contract.² So where the grantee of land covenants and agrees to assume and pay off a mortgage on the land as part of the purchase money, which he fails to do, and the mortgagee commences an action to foreclose, the contract of the grantee cannot be specifically enforced until it is shown that there will be a deficiency on the sale of the land, and the amount of the deficiency.³

§ 14. *Agreements for the sale of land.*—The jurisdiction of equity in compelling specific performance, is most frequently exercised in the case of contracts concerning real estate; the remedy being applied not only as between the original parties, but also as to those who claim under them in privity of estate, representation, or title.⁴ Where parties contract for the sale and purchase of land, equity, upon the showing of a proper case for its interference, will decree that a good and sufficient conveyance be made upon payment of the purchase money.⁵ The form of a contract of sale is not important, provided the contract itself is in its nature unobjectionable.⁶ If there is ground to infer an intention to convey upon a valuable consideration, and the legal

¹ Hoy v. Hansbrough, 1 Freem., Miss. Ch., 533.

² Foote v. Garland, 1 Sm. & Marsh, Ch. 95.

³ Slauson v. Watkins, 44 N. Y. Supr. Ct., 73.

⁴ Glaze v. Drayton, 1 Desau., 109; McMorris v. Crawford, 15 Ala., 271; Ewins v. Gordon, 49 New Hamp., 444; Nesbit v. Moore, 9 B. Mon., 508; Tiernan v. Roland, 27 Pa. St., 429; Ambrouse v. Keller, 22 Gratt., 769; Laverty v. Moore, 33 N. Y., 658. See *Post*, Book 2, Ch. 1.

⁵ Murphy v. McVicker, 4 McLean, 252. ⁶ St. Paul Division v. Brown, 9 Minn., 157.

estate does not pass, the court will compel the execution of a proper instrument.¹ A father promised to bequeath to his son certain money in consideration of the services of the son in managing his father's estate ; and, in exchange for a lot of land conveyed to him by the son, to devise two specified lots of his own, to the son. The will, to the above effect, being invalid for want of three witnesses, it was held that a bill for specific performance as to the land would lie.² The doctrine of specific performance is applicable to contracts for any estate in land, as a contract to grant a lease, or to renew a lease, or a contract for the assignment of a lease.³

§ 15. *Ground of vendor's claim to the remedy.*—As the vendor of land seeks only the payment of the purchase money, it might be contended, that he had an adequate remedy at law, and therefore could not sustain a bill for the specific performance of the contract. A moment's reflection will, however, show that damages would not restore him to the situation he would be in, if the contract were performed. Where the sale is completed, the vendor parts with his land, and gets what he deems an equivalent. But after an action at law, he still has the land, and in addition, damages representing the difference between the stipulated price and the price which it would probably bring if re-sold, together with incidental expenses and such special damage as he may have sustained.⁴ He is, however, entitled to the

¹ Varick v. Edwards, 1 Hoffm., Ch. 382. Where a vendee entered into possession of land by consent of the vendor, and under an agreement that the vendor would execute to him, upon payment of the purchase money, a title bond conditioned for a conveyance of the land as soon as the vendor obtained a deed of the same, it was held that equity would decree the execution of such bond upon payment of the purchase money. Sterling v. Klepsattle, 24 Ind., 94.

² Maddox v. Rowe, 23 Ga., 431. Where it was proper for trustees to convey the legal title to land, and one of the trustees denied that he had accepted the trust, and refused to convey, but there was some evidence of an acceptance, the court decreed a conveyance by him. Vaughan v. Barclay, 6 Whart., 392.

³ Harding v. Metropol. R.R., L. R. 7, Ch. 154. *Post*, § 36.

⁴ Eastern Counties R.R. Co. v. Hawkes, 5 House of Lds., 331 ; Lewis v. Lord Lechmere, 10 Mod., 503. The sale may have been made for other than a mere money consideration. Upon the purchase of land by a railway company, the company entered into a covenant with the vendor, that a certain portion of the land

specific performance of the contract of sale, not because the relief at law may be inadequate, but upon the principle of mutuality of remedy. It has been said that he may maintain a suit in every case in which the purchaser can sue for specific performance ;¹ and this, notwithstanding the purchase money has been paid ; his right to be relieved from the responsibilities appertaining to the ownership, being sufficient to sustain the suit.² Where land was sold to a railroad company, it was held not a defence to the suit of the vendor, that the amount of the purchase money, and the damages consequential on the purchase, were fixed by the agreement of the parties at a specified sum.³ His bill has, however, been dismissed, when the sole object of it was to obtain payment of the purchase money.⁴ The doctrine of equity that upon the execution of the contract, the land is converted into money, and the money into land, and

purchased "should be forever thereafter used and employed as and for a first-class station or place for the purpose of taking up and setting down passengers traveling along the railway." The company having broken their covenant by stopping at this particular station only such trains as stopped at nearly all other stations, and also by gradually withdrawing from the station the accommodation originally provided for passengers, it was held that the land owner was entitled to a decree against the company for a specific performance of the agreement. *Hood v. Northwestern R.R. Co.*, 8 Eq., 666 ; *Affd.*, 5 Ch. App., 525.

¹ *Adderley v. Dixon*, 1 Sim. and Stu., 607 ; *Clifford v. Turrell*, 1 Yo. and Col. C. C., 138, *Affd.* 9, Jur. 633 ; *Kenny v. Waxham*, 6 Madd., 355 ; *Walker v. Eastern Counties R.R. Co.*, 6 Hard., 594. Although a vendor of real estate usually has an adequate remedy at law, yet he has a choice of remedies. *Pincke v. Curteis*, 4 Brown's Ch. R., 329 ; *Carey v. Smith*, 2 N. Y., 60 ; *Schroeppel v. Hopper*, 40 Barb., 425 ; *Bryson v. Peak*, 8 Ired. Eq., 310 ; *Phyfe v. Wardell*, 5 Paige Ch., 268 ; *Springs v. Sanders Phill.* N. C. Eq., 67 ; *Finley v. Aiken*, 1 Grant Pa. Cas., 83 ; *Larison v. Barb*, 4 Watts, 27 ; *Old Colony R.R. Co. v. Evans*, 6 Gray, 25. F. contracted in writing with M. to convey to him certain lands for a stipulated price, to be made in two payments. F. was to do certain work on the land, for which he was to have the right to all the timber thereon, with two years to remove the same. At a given day M. was to make the first payment and have possession, and he was to leave a road open so that F. could have free access to the timber. The contract was signed by both parties. F. filed a bill for specific performance, alleging that he had done the work, and was ready and willing to fulfil the balance of his contract, but that M. refused to pay any portion of the purchase price, or receive the land. Held that the bill should not be dismissed for want of equity. *Forsyth v. McCauley*, 48 Ga., 402.

² *Shaw v. Fisher*, 2 De G. and S., 11 ; *Wayne v. Price*, 3 Ib., 310 ; *Cheale v. Kenward*, 3 De G. and J., 27.

³ *Webb v. Direct London, etc., R.R. Co.*, 9 Hare, 129.

⁴ *Deck's Appeal*, 57 Pa. St., 467 ; *Kauffman's Appeal*, 55 Ib., 383. *Ante* § 9, note 5.

the vendor's lien for the purchase money, has been mentioned as an additional reason why the remedy should be mutual.¹ But it has been said that the court will more readily listen to objections made against a vendor seeking specific performance, "because he can get complete relief at law."² Where the contract has fallen through, leaving no claim except that of the vendor for compensation for a breach, the court will not, in general, exercise any jurisdiction in his behalf, but will leave him to his remedy at law.³

§ 16. *In the case of personal property.*—It is on the ground that the remedy at law is adequate, that the court, subject to exceptions, will refuse to entertain suits in respect to goods, stock, and other things of a merely personal nature.⁴ For, although it is against conscience, that a man should be permitted to evade the exact fulfilment of any *bona fide* contract, yet payment of the money value of most kinds of personal property, at the market price in lieu of its delivery, by enabling the purchaser to obtain other property of the same kind, will afford him full compensation. But in all cases, whatever may be the nature of the property, if the plaintiff has not an adequate remedy at law, a court of equity will entertain jurisdiction.⁵ It is not

¹ Fry on Specif. Perform., 10.

² Webb v. Direct London and Portsmouth R.R. Co., 1 De G. M. and G., 721.

³ Ibid. Stuart v. London and N. W. R.R. Ibid., 521. Where contracts are made for the purchase of real estate for public purposes, such as highways, railroads, canals, parks, and the like, but which contracts being altogether executory, are abandoned, and the vendor remains in possession, he must seek his redress at law, and not in equity. In Webb v. London and Portsmouth R.R. Co., 9 Eng. L. and Eq., 249, on appeal, the defendants had entered into an agreement to purchase certain lands not exceeding eight acres, for a proposed railroad, and to pay four thousand five hundred pounds for them, but which were not taken, though the defendants entered to make a survey and estimate, and cut one tree, and the plaintiff was not otherwise disturbed in his possession and enjoyment. Held, not a case for specific performance.

⁴ Madd. Ch. Pr., 230; Pooley v. Budd, 7 Eng. L. & Eq., 228; 14 Beav., 34; Coldwell v. Myers, Hard., Ky., 551; Madison v. Chum, 3 J. J. Marsh, 230; Cowles v. Whitman, 10 Conn., 121; Justice v. Croft, 18 Ga., 475; Phillips v. Berger, 2 Barb., 608; Scott v. Billgerry, 40 Miss., 119.

⁵ Clark v. Flint, 22 Pick., 231; Roundtree v. McLean, 1 Hemp., 245; Sullivan v. Fink, 1 Md. Ch., 59; Waters v. Howland, Ib., 112; City Council v. Page, Spear, S. C. Ch., 159; Hoy v. Hansborough, 1 Freem. Miss. Ch., 533; Lloyd v. Wheatly, 2 Jones' Eq., 267; Johnson v. Rickett, 5 Cal., 218; Duff v. Fisher,

therefore a ground of demurrer to a bill, that it seeks specific performance of a contract relating to personalty.¹ Where a vendee paid the entire consideration for personal property, and before its delivery the vendor was about to dispose of it in fraud of the vendee's rights, and it appeared that the vendor was insolvent, and that there would be difficulty in replevying the property, it was held that the vendee was entitled to an injunction in the nature of specific performance.² Where the delivery of chattels is part of a contract otherwise capable of being enforced, specific performance may be decreed.³ An exception to the general

15 Ib., 375; *Furman v. Clark*, 11 N. J. Eq., 3 Stock., 306. But contracts of this description will be weighed with greater nicety than such as relate to lands. *Mechanics' Bank v. Seton*, 1 Pet., 299; *Cutting v. Dana*, 25 N. J. Eq., 265. A. and B. entered into an agreement in writing, by which A. was to convey to B. certain patent rights, which A. refused to do, when B. filed a bill to compel specific performance, which was decreed, B. having no remedy at law. *Corbin v. Tracy*, 34 Conn., 325. Mr. Story, Eq. Juris., Sec. 724, remarks that the supreme court of the United States has manifested an inclination "to maintain a far more extensive jurisdiction in equity to grant relief by a specific performance, in contracts respecting personal chattels, than is at present exercised in the English courts." Referring to *Barr v. Lapsley*, 1 Wheat., 151; *Mechanics' Bank of Alexandria v. Seton*, 1 Peters, 305. Another writer says that there seems to be a tendency throughout this country to subordinate the distinction between contracts which relate to realty, and those which refer to personalty, to the general question whether the plaintiff is fairly entitled to more perfect relief than he can obtain at law. *Parsons on Contr.*, 3d Ed., p. 535. An agreement entered into to pay in gold coin should be specifically enforced, when gold, silver, and bank bills have different market values. *Hall v. Hiles*, 2 Bush., Ky., 532. Where a note payable in gold was given for land, and the land was valued on a gold basis, it was held that specific performance should be decreed irrespective of the question whether treasury notes are a legal tender, and that judgment should be rendered against the maker for the value of the gold in paper currency. *Hord v. Miller*, 2 Duvall, Ky., 103.

¹ *Carpenter v. Mu. Safety Ins. Co.*, 4 Sandf., Ch. 408.

² *Parker v. Garrison*, 61 Ill., 250. But where a debtor agreed to transfer stock as collateral security for a debt, and died insolvent before doing so, the court refused to enforce specific performance of the agreement to the injury of other creditors. *City, etc., Ins. Co. v. Olmstead*, 33 Conn., 476.

³ *Marsh v. Milligan*, 3 Jur., N. S., 979. Equity may enforce an agreement by a holder of notes, to deliver them up to the maker to be canceled, notwithstanding they are overdue, and in the hands of the original payee. *Tuttle v. Moore*, 16 Minn., 123. In this case, the defendant insisted that the plaintiff was not entitled to the equitable relief sought, because he had an adequate remedy at law, inasmuch as the notes were overdue, and in the hands of the original payee, so that they could not be used or transferred to prejudice his defence; and no special ground, or even apprehension of injury, was stated in the complaint calling for the interposition of the court. To this, the court replied, that as the defendant expressly agreed to cancel and deliver up the notes, the granting of the relief sought was simply compelling the specific performance of his

rule may also arise, where the right to chattels enters into, and is a material part of, a contract in relation to real estate. A landlord, in letting a farm, contracted with the tenant that the latter should have the stock thereon, but afterward seized it under a distress and bill of sale. Lord Eldon made an order that the stock be restored, holding that the contract was entire, entitling the tenant to both the estate and the chattels; the latter being essential to the enjoyment of the estate.¹ So, if the plaintiff can only be compensated in damages for some of several articles purchased by him, specific performance will be decreed as to all.²

§ 17. *Specific delivery of goods.*—The rule that a suit cannot in general be maintained for the specific performance of a contract for the sale of goods, is applicable where the goods are to be delivered from time to time by instalments, although the damages must be assessed upon conjecture as to the future market price.³ If, however, the remedy at law would be wholly inadequate or impracticable, specific performance will be decreed.⁴ Where a foreigner

express contract, and was, in truth, the only adequate and complete remedy for the plaintiff; that if an action were brought upon the notes, the plaintiff might be prevented from making a successful defence in consequence of lapse of time, death, removal, or forgetfulness of witnesses, the loss of documentary evidence, or other contingencies not within his control; and that there was no good reason why the plaintiff should be subjected to this risk, nor any injustice in compelling the defendant to do what he agreed to do.

¹ Nutbrown v. Thornton, 10 Ves., 159.

² McGowin v. Remington, 12 Pa. St., 56.

³ Fothergill v. Rowland, L. R. 17, Eq. 132; Pollard v. Clayton, 1 Kay & Johns., 462. But see Taylor v. Neville, cited 3 Atk., 384.

⁴ And if the legal remedy is insufficient, a court of equity may order the delivery up of goods wrongfully detained. Dowling v. Bitjemann, 2 J. & W., 544. "Though the action of replevin is with us a broader remedy than in England, lying in all cases when one man improperly detains the goods of another, it is in no instance effective to enforce a specific return of chattels, since a claim of property and bond given are always sufficient to defeat reclamation, no matter what may be the eventual issue of the contest. As, therefore, our common law tribunals are as powerless for such a purpose as the similar English courts, the propriety of exercising the equitable jurisdiction must depend with us on the same reasons that are deemed sufficient to call it into action there. Here, as there, the inquiry must be whether the law affords adequate redress by a compensation in damages where the complaint is of the detention of personal chattels. If not, the aid of a court of chancery will always be extended to remedy the injury by decreeing a return of the thing itself." Bell, J., in McGowin v. Remington, *supra*.

had contracted for the sale of a ship which subsequently arrived at an English port, the removal of the ship was restrained by injunction, as an action at law for damages could not be maintained by the buyer.¹ And where goods of special value were sold, and there were no other similar goods in the market, a disposal of them by the seller in breach of the contract, was restrained by injunction.² If the seller retain the goods in trust for the buyer, or his assignee, the court will compel the execution of the trust; the nature of the subject matter presenting no obstacle to interference by the court.³ A court of equity may compel the maker of a promissory note, who, having obtained possession of it from the holder under promise to return it or execute another note of the same tenor and amount, has destroyed it, to execute and deliver a new one.⁴ So, where an agent has possession of goods for his principal, he will be enjoined from improperly disposing of them, and specific delivery be compelled.⁵

§ 18. *Articles of exceptional value.*—Goods which have a peculiar value, as articles of curiosity, antiquity, or affection, the loss of which could not be estimated in damages, will be decreed to be delivered to the person entitled, such as: family pictures, furniture, or heirlooms;⁶ an ancient

¹ Hart v. Herwig, L. R. 8, Ch. 860. ² Hughes v. Greene, 33 L. J. Q. B., 335.

³ Pooley v. Budd, 14 Beav., 34; Stanton v. Percival, 5 H. L. C., 257; Cowles v. Whitman, 10 Conn., 121. See Ferguson v. Paschall, 11 Miss., 267.

⁴ McMullen v. Vanzant, 73 Ill., 190. An agreement in writing for the conveyance of land and payment of the purchase money was executed by both parties, but left in the hands of the vendor, with the stipulation that the vendee should have a duplicate thereof, on payment of a certain sum. Held, that on payment of the amount by the vendee, no demand of the duplicate was necessary, but he was entitled to specific performance, and that the withholding of the duplicate was a reasonable excuse for non-fulfilment on his part. Hull v. Noble, 40 Me., 459. Where plaintiff sold his horse and wagon and the goodwill of his business, which consisted of a list of his customers, the defendant agreeing to pay in instalments, and, on failure to do so promptly, to return to the plaintiff the horse and wagon and the list of customers, and the payments were not made, it was held that equity would enforce specific performance. Palmer v. Graham, 1 Pars. Pa. Sel. Cas., 476.

⁵ Wood v. Rowcliffe, 3 Hare, 304.

⁶ Lady Arundell v. Phipps, 10 Ves., 133; Earl of Macclesfield v. Davis, 3 V. & B., 16; Falcke v. Gray, 5 Jur. N. S., 645.

silver altar-piece, noted for a Greek inscription and dedication to Hercules ;¹ the celebrated Pusey horn, possession of which was recovered by the heir of the family of Pusey, the case turning upon the *pretium affectionis*, independently of the circumstance as to tenure ;² the dresses, decorations, papers, and effects of a lodge of Freemasons ;³ a tobacco box of a remarkable character, belonging to a club ;⁴ a box of jewels.⁵ So, specific performance will be decreed of a contract for the delivery of chattels which no one but the defendant can supply, and which are necessary to enable the plaintiff to fulfil an engagement with a third person : as if a man were to contract to furnish timber to a ship-builder who had agreed to complete a ship by a given time, which he could not do unless the timber was supplied by the defendant ; but not where the delivery of the chattels by the defendant is a mere question of convenience—as the supply of coal from an adjoining mine, when abundance of other coal can be obtained in the neighborhood.⁶

§ 19. *Where the contract is for the sale of stock.*—A contract for the sale of stock which can be obtained in the market, will not in general be specifically enforced ; the buyer, or seller, having a sufficient remedy at law, in the market price of such stock. Lord Macclesfield refused to decree the specific performance of an agreement for the transfer of South Sea stock, for the following reasons : first, the nature of the subject matter of the contract ;

¹ Duke of Somerset v. Cookson, 3 P. Wms., 390.

² Pusey v. Pusey, 1 Vern., 273.

³ Lloyd v. Loaring, 6 Ves., 773.

⁴ Fells v. Read, 3 Ves., 70.

⁵ Saville v. Tancred, 1 Ves. Sen., 101. See Lowther v. Lowther, 13 Ves., 95 ; Pearne v. Lisle, Amb., 77 ; Earl of Macclesfield v. Davis, 3 V. & B., 16. In an early case in North Carolina, a contract for a favorite slave was specifically enforced, Chief Justice Taylor saying that, "For a faithful family slave, endeared by a long course of service or early associations, no damages can compensate ; for there is no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart." Williams v. Howard, 3 Murphy, 74.

⁶ Buxton v. Lister, 3 Atk., 385.

second, the circumstance that the defendant was not possessed of the stock at the time of the contract ; third, the liability to sudden rise and fall in the stock.' In a subsequent case, however, Lord Hardwicke granted specific performance of such an agreement ;² and the rule has been departed from in other cases.³ The same principles govern in contracts for the sale of stock as in the sale of other property, that is, if a breach can be fully compensated in damages, equity will not interfere ; while it will do so, when, notwithstanding the payment of the money value of the stock, the plaintiff will still lose a substantial benefit, and thereby remain uncompensated. If a contract to convey stock is clear and definite, and the uncertain value of the stock renders it difficult to do justice by an award of damages, specific performance will be decreed.⁴ Where scrip certificates constituted the legal title of the purchaser of new stock, without which he could not maintain an action for the stock, their specific delivery was decreed.⁵ The rule of exclusion does not apply to railway shares, which are limited in number, and not always to be had in the market.⁶ A vendor of railway shares may maintain a suit against the purchaser to compel him to complete the purchase by the execution and registration of a proper transfer, and to indemnify the seller against future calls.⁷ Specific performance will be decreed of a contract

¹ *Cud v. Rutter*, 5 Vin. Abr., 538 ; 1 P. Wms., 570.

² See *Nutbrown v. Thornton*, 10 Ves., 161.

³ *Withy v. Cottle*, 1 Sim. & Stu., 174 ; *Colt v. Nettervill*, 2 Sim., 304.

⁴ *White v. Schuyler*, 1 Abb. Pr. N. S., 300 ; 31 How. Pr., 38 ; *Treasurer v. Commercial Co.*, 23 Cal., 390.

⁵ *Doloret v. Rothschild*, 1 Sim. & Stu., 590.

⁶ *Duncuft v. Albrecht*, 12 Sim., 189 ; *Wilson v. Keating*, 4 De G. & J., 388 ; *Cheale v. Kenward*, 3 Ib., 27 ; *Paine v. Hutchinson*, L. R. 3, Ch. 388.

⁷ *Shaw v. Fisher*, 2 De G. & Sm., 11 ; *Wynne v. Price*, 3 Ib., 310 ; *Walker v. Bartlett*, 18 C. B., 845. The plaintiffs, who were dealers in stock, contracted to sell to the agent of the defendant shares which they had bought from, and which remained registered in the name of, C. On the settling day, the agent of the defendant gave the name of the latter to be inserted in the deeds of transfer. Transfers, executed by C. to the defendant, were delivered to the defendant's agent, who paid for the shares out of money given to him by the defendant. The defendant would not execute the deeds and procure their registration, on

for the sale of shares in a company, although the sale is subject to the approval of the directors, unless the directors refuse to permit the sale.¹ And an applicant for shares in a company will be compelled, after an allotment in due form, to accept the shares allotted, and to sign the articles of association, if he has contracted to do so.² Equity will enforce an agreement to convey real estate and to transfer shares in a corporation, both as to the real estate and the shares.³

§ 20. *Contract in relation to debts.*—The power of the court to compel the specific performance of contracts is limited to what is expedient and practicable. In the case of a mere debt or claim to the payment of money, or to damages for a breach of contract, there is an adequate remedy at law.⁴ So, specific performance will not be decreed of a contract to borrow or lend money.⁵ But it is otherwise of an agreement to give security for a debt, as: an agreement to execute a mortgage, notwithstanding the mortgage is to contain a power of sale which may be exercised without delay;⁶ or an agreement to grant an annuity,

the ground that he told his agent that he intended to resell without taking a transfer, and that his name had been given without authority. A few months after the sale the company was ordered to be wound up. A bill for specific performance and indemnity having been filed before the winding up, to which C. was not a party, it was held that the plaintiffs were entitled to the relief asked. *Paine v. Hutchinson*, L. R. 3, Eq. 257; *Affd.* 3, Ch. App. 388.

¹ *Poole v. Middleton*, 29 Beav., 646; *Birmingham v. Sheridan*, 33 Ib., 660.

² *New Brunswick Land Co. v. Muggerridge*, 4 Drew, 686; *Oriental Steam Co. v. Briggs*, 2 Johns. & Hem., 625.

³ *Leach v. Forbes*, 11 Gray, 506.

⁴ *Kirk v. Bromley Union*, 2 Phil., 640; *Greenaway v. Adams*, 12 Ves., 401; *Todd v. Gee*, 17 Ib., 278; *Jenkins v. Parkinson*, 2 M. & K., 5. But a contract for the sale of a debt will be specifically enforced where the complainant has not a clear and adequate remedy at law, as: where the creditors of an insolvent firm agreed to sell their claims to one of their number at twenty-five per cent. *Cutting v. Dana*, 25 N. J. Eq., 265. An agreement in writing, by the owner of a mortgage debt, that, on receiving money from another person, he will pay him a specified portion of the debt "when received, and in manner as received," is such an agreement as may be specifically enforced. *Buck v. Swazey*, 35 Me., 41.

⁵ *Rogers v. Challis*, 27 Beav., 175; *Siebel v. Mosenthal*, 31 L. J. C., 326; *Larios v. Gurety*, L. R. 5, P. C. 346.

⁶ *Ashton v. Corrigan*, L. R. 13, Eq. 76; *Robinson v. Cathcart*, 2 Cranch, 590. A. agreed to convey to B. a lot of land, on condition that B. would previously secure to C. a sum of money by mortgage on the lot. Held, that equity might

and to charge it on land or other property;¹ or an agreement, by the vendor of land, to release the land from the lien of a mortgage.² A. sold land to B., the purchase price to be paid within a short time, in order to release the land from the lien of certain mortgages. B. paid part of the purchase price, and filed a bill to enjoin his vendor, whom he alleged was insolvent, from selling, and from committing waste, and obtained a decree. Afterward, having tendered good notes to the full amount of the purchase money, and offered to perform, he filed an amended bill to compel a specific performance of the contract. In the meantime the land was sold under foreclosure, and bought in by B., who paid cash to the amount of the lien. Held, that B. had a right to extinguish the lien in that way, and was entitled to a decree.³ When damages at law would not accurately represent the value of the contract to either party, a court of equity will grant relief. This was done where the contract was for the sale of debts proved under two commissions of bankruptcy, the court considering that to compel the plaintiff to accept damages would be to oblige him to sell these dividends, which were of unascertained value, at a conjectural price.⁴

§ 21. *Contract with penalty.*—Equity has regard to the substantial agreement between the parties and its real object, and not to that which seems to be the object. The

compel the execution of the mortgage; or, if due, its payment might be enforced, by the decree, upon the interest of A. and B. in the lot. *Ogden v. Ogden*, 4 Ohio St., 182. A parol contract for a mortgage of personal property, based upon a valuable consideration, may be enforced in a court of equity, if the contract is not such as the statute of frauds requires to be in writing. *Triebert v. Burgess*, 11 Md., 452. C. promised to transfer to A. and B., to secure them for becoming sureties on promissory notes of C., certain partnership assets of the firm of C. and D., C. being in failing circumstances. It was held that A. and B. were entitled to a decree on the filing of a proper bill for the purpose, averring that the notes, though made by C., were the notes of the firm. *Shockley v. Davis*, 17 Ga., 177.

¹ *Withy v. Cottle*, 1 Sim. and Stu., 174; *Lyde v. Mynn*, 1 M. and K., 683; *Wellesley v. Wellesley*, 4 M. and Cr., 579.

² *Bennett v. Abrams*, 41 Barb., 619; *Barkley v. Barkley*, 14 Rich. Eq., 12.

³ *Berry v. Walker*, 6 B. Mon., 464.

⁴ *Adderley v. Dixon*, 1 Sim. and Stu., 607.

circumstance that something has been done purporting to be an execution of the agreement, will be no answer to a claim for specific performance if the alleged execution be not in accordance with the intentions of the parties. The general rule of equity is, that if a thing is agreed to be done, and a penalty is given to secure performance, to be enforced in case the party refuses to perform, the court will fasten upon the express contract, and will say to him, "You cannot fall back upon the penalty, but must do the act."¹ Where a clause for the payment of a penal sum is inserted in an agreement, the interference of equity will depend upon the question whether or not the contract will be satisfied by payment. If it be stipulated to do one of two things, namely, to perform an act, or pay a sum of money, the latter will suffice, and there will be no ground for equitable procedure against the party who has the choice. On the other hand, where the agreement is, that a certain thing shall be done, with a penalty added to secure its performance, a court of equity may, notwithstanding the penalty, enforce the performance of the very thing, and thus carry out the intentions of the parties.² Thus, where a grantee of land executed a bond, in consideration of the conveyance to support the grantor for life, and, in case of neglect to re-convey the land, it was held that upon failure of the grantee to perform, equity would decree a re-conveyance.³

¹ *Chilliner v. Chilliner*, 2 Ves. Sen., 528; *Hobson v. Trevor*, 2 P. Wms., 191; *Parks v. Wilson*, 10 Mod., 517; *Winslow v. Dawson*, 1 Wash., 118; *Telfair v. Telfair*, 2 Desau. Ch., 271.

² *Howard v. Hopkins*, 2 Atk., 371; *French v. Macale*, 2 Dr. and W., 269; *Roper v. Bartholomew*, 12 Price, 797; *Gillis v. Hall*, 2 Brews., Pa., 342; *Broadwell v. Broadwell*, 6 Ill., 599; *Dailey v. Litchfield*, 10 Mich., 29.

³ *Robinson v. Robinson*, 9 Gray, 447. "The taking of a bond, or other security, for the purchase money, might reasonably lead to the conclusion that the vendor trusted to such security, and that the estate was intended to be absolutely vested in the vendee."—Fonbl. Eq., Book I, ch. 3, sec. 3, note E, referring to *Bond v. Kent*, 2 Vern., 281; *Towell v. Heelis*, Amb., 724; *Nairn v. Prowse*, 6 Ves., 752; *Blackburn v. Gregson*, 1 Bro., 420; *Mackreth v. Symmons*, 15 Ves., 329; *Cowell v. Simpson*, 16 lb., 278; *Great v. Mills*, 2 Ves. and Bea., 306; *Peake ex parte*, 1 Mad., 356; *Gilman v. Brown*, 1 Mason, 214; *S. C.*, 4 Wheat., 255; *Wragg v. Comp. Gen.*, 2 Desau. Ch., 509; *Stouffer v. Coleman*, 1 Yeates, 398.

So, a contract to indemnify one against a pecuniary liability may be specifically enforced, although its performance is secured by a penalty.¹

§ 22. *Agreement to pay liquidated damages.*—Notwithstanding the contract stipulates for the payment of liquidated damages in case of failure to perform, the court may decree specific performance, unless an option for payment instead of performance be given in the contract.² Where a lessee agreed to grant an under-lease, and that, if the landlord refused a license required for that purpose, he would pay one thousand pounds by way of liquidated damages, it was held that he could not escape specific performance by paying the money instead of applying for the license.³ So, where an agreement for the sale of land provided that no building should be erected beyond a certain line, and in case of a violation of any of the covenants or stipulations, a specified sum should be paid as liquidated damages, an injunction was granted against building in breach of the agreement.⁴ Where it was covenanted not to carry on, or be concerned in carrying on, the trade of saddler within ten miles of a certain town, “under a penalty of one hundred pounds, to be paid by way of liquidated

¹ Chamberlain v. Blue, 6 Blackf., 491. Where an administrator assigned a contract for the purchase of lands to the defendants, who covenanted and agreed to take up and cancel the contract, and to indemnify the administrator from all damage which he might sustain by reason of the contract, it was held that the administrator was entitled to a specific performance. *Champion v. Brown*, 6 Johns., Ch. 398.

² *Hull v. Sturdivant*, 46 Me., 34. “Courts of equity will not suffer their jurisdiction to be evaded merely by the fact that the parties have called a sum damages, which is, in fact and intent, a penalty; or, because they have designedly used language and inserted provisions which are in their nature penal, and yet have endeavored to cover up their objects under other disguises.” Story’s Eq. Juris., Sec. 1318. If the owner of land agrees in writing to convey it at a certain price, and by another written agreement promises to forfeit a certain sum of money if he fail so to convey, equity will compel a conveyance upon performance of the terms of the agreement by the other party. *Dooley v. Watson*, 1 Gray, 414. Where tenants in common made an agreement purporting to be signed by all, but in fact executed by and delivered as the deed of some of them only, it was held that it might be enforced against the latter, although it provided for the forfeiture of a certain sum as liquidated damages in case of breach. *Hooker v. Pyncheon*, 8 Ib., 550.

³ *Long v. Bowring*, 33 Beav., 585.

⁴ *Cole v. Sims*, 5 De G. M. & G., 1.

damages for every such offence," and the covenantor engaged as a journeyman for another saddler, it was held a breach of the covenant, and that the covenantee was entitled to an injunction.¹ So, a bond having been given by a solicitor's clerk to his employé in the sum of one thousand pounds, to be paid in case the obligor should carry on the business of solicitor within a certain distance, it was held that the bond was not designed merely to secure the price of practicing, but to prevent it, and an injunction was granted.²

§ 23. *When contract deemed optional.*—If the agreement be construed as giving to the party the option to do the act or pay a certain sum, equity will not interfere. In determining the question, the court will have regard to the whole agreement, and not merely look at the language expressing the penal sum. It may treat the word "penalty" as meaning liquidated damages,³ or the words "liquidated damages" as meaning a penalty.⁴ It may do this, notwithstanding the contract be alternative in its form, if the court can clearly see that the contract is to perform one of the alternatives. Where, for instance, the contract was for the renewal of a lease for a term of three years, or to answer in damages, specific performance of the lease was decreed; the alternative only expressing what the law would imply.⁵

§ 24. *Stipulations in lease how regarded.*—When it is

¹ Jones v. Heavens, L. R. 4, C. D. 636.

² Howard v. Woodward, 34 L. J. C., 47; but see Nobles v. Bates, 7 Cow., 307; Dakin v. Williams, 22 Wend., 201.

³ Jones v. Green, 3 Y. & J., 298.

⁴ Cole v. Sims, *supra*; Lampman v. Cochran, 16 N. Y., 275.

⁵ Finch v. Earl of Salisbury, Finch, 212. Equity will withhold or grant relief according as the plaintiff can or cannot be fully compensated by the payment of damages. Skinner v. White, 17 Johns., 357; Skinner v. Dayton, 2 Johns. Ch., 431; Hackett v. Alcott, 1 Call., 533; City Bank of Baltimore v. Smith, 3 Gill & Johns., 265; Moore v. Platte County, 8 Mo., 467. In a case free from fraud, the intention of the parties, if it can be ascertained, must govern as to whether the sum specified is to be regarded as a penalty or as liquidated damages. Durst v. Swift, 11 Texas, 273; Cothreal v. Talmadge, 9 N. Y., 557; Bagley v. Peddie, 16 Ib., 469. *Contra*, Jaquith v. Hudson, 5 Mich., 123. When it is doubtful what the parties really intended, the inclination of the court is to regard the amount named as a penalty. Foley v. Keegan, 4 Iowa, 1.

stipulated in a lease that in case the lessee shall violate a covenant contained therein, he shall pay an increased rent, it is regarded as in the nature of liquidated damages, and it has been held that upon an action brought to recover a sum thus reserved, a court of equity ought not to interpose, or give any relief.¹ Accordingly, where a lessee covenanted not to plough any land, and in case he did, to pay twenty shillings an acre every year, the court refused to enjoin him from ploughing the land.² So, where a lease was made subject to an increased yearly rent in case the lessee did not manage the farm in a certain prescribed way, and also, in case during the last three years of his term he should sow more than seventy acres of clover in one year, to an additional rent of ten pounds a year for every acre above the seventy acres, it was held that the additional rents were in the nature of liquidated damages.³ So, where a lessee covenanted not to erect a weir, under the penalty of double the annual rent, to be recovered by distress, this was held to be liquidated damages; the power of distress being regarded as a strong circumstance in favor of that view.⁴ Exceptions to the rule, owing to the peculiar circumstances of the case, have occurred: as where the lessee had covenanted not to plough ancient meadow, or if he did, to pay an increase of rent, the court, upon his threatening to plough, granted an injunction.⁵ If the agreement would be unreasonable unless the person stipulating to pay the sum had an option, this will be a strong circumstance for regarding the agreement as alternative. Where an administratrix covenanted, under a penalty of seventy pounds, to renew a sub-lease as often as she obtained a renewal of the original lease, and it appeared that the fines on the head lease were raised on renewal according to the then value of the property, so as to render her covenant unreasonable, except upon the construc-

¹ Rolfe v. Peterson, 2 Bro. P. C., 436.

² Woodward v. Gyles, 2 Vern., 119.

³ Jones v. Green, 3 Y. and J., 298.

⁴ Gerrard v. O'Reilly, 3 Dr. and W., 414; French v. Macale, 2 Ib., 269.

⁵ Webb v. Clarke, *cited*, 1 Fonbl. Eq., 154.

tion of its giving her an option, the court treated the sum as liquidated damages.¹ When a sum is made payable if certain things are not done, and the performance is also further secured by a penalty, the first sum will be treated as liquidated damages;² though in one case, the court, notwithstanding this circumstance, decreed that the agreement should be specifically performed.³ Where it is stipulated in a lease that, in addition to an increased rent, the act provided against shall be a forfeiture of the covenantor's interest, the sum is deemed a penalty, and not liquidated damages.⁴

§ 25. *When sum reserved deemed a penalty.*—When the penalty is small compared with the value of the subject of the contract, it is a reason for regarding the sum reserved as not in the nature of an alternative agreement.⁵ Where a man, entertaining doubts as to what estate he should inherit, upon the marriage of his daughter, entered into a bond in five thousand pounds, with a condition to settle one-third of the property he should derive from his father, the agreement was specifically enforced.⁶ In another case, in which the condition recited an agreement for a settlement comprising a sum of money, and also real estate, with a penalty double this sum, but without any reference to the real estate, specific performance was decreed of the agreement.⁷ So, where a contract for sale contained a proviso, that, if either party broke the agreement, he should pay one hundred pounds to the other, specific performance was decreed, not-

¹ *Magram v. Archbold*, 1 Dow, 107.

² *Ranger v. Gt. Western R.R. Co.*, 5 House of Lds., 73.

³ *Chilliner v. Chilliner*, 2 Ves. Sen., 528.

⁴ *French v. Macale*, 2 Dr. and W., 269. A court of equity will not enforce specific performance of a condition in a contract of sale, the non-fulfilment of which will forfeit the estate. As the grantor has fixed his own conditions, he can forfeit the estate at his pleasure. *Woodruff v. Water Power Co.*, 10 N. J. Eq., 489. Equity will not enforce a forfeiture. *Warner v. Bennett*, 31 Conn., 461; *Lefforge v. West*, 2 Ind., 514; *Smith v. Jewett*, 40 N. H., 530; *White v. Port Huron, etc., R.R. Co.*, 13 Mich., 356; *Fitzhugh v. Maxwell*, 34 Ib., 138; *Orr v. Zimmerman*, 63 Mo., 72; *Palmer v. Ford*, 70 Ill., 369; *Beecher v. Beecher*, 43 Conn., 556; and the court often interposes to prevent the enforcement of a forfeiture at law. *Keller v. Lewis*, 53 Cal., 113.

⁵ *Chilliner v. Chilliner*, *supra*.

⁶ *Hobson v. Trevor*, 2 P. Wms., 191.

⁷ *Prebble v. Boghurst*, 1 Swanst., 309.

withstanding the defendant insisted that it was the intention of both parties, that upon either paying one hundred pounds, the agreement should be void.¹ Where the penalty, if paid, will go to a different person from the one for whose benefit the agreement is entered into, it will be deemed a strong circumstance against regarding the agreement as alternative in its nature. A father having, on the marriage of his son, given a bond, in the penalty of twelve hundred pounds, for the payment of six hundred pounds to the wife's father, his executors or administrators, if the obligor did not convey certain lands for the benefit of the husband and wife, and their issue, it was held that as the six hundred pounds paid, would not go to the husband and wife and their issue, but to the wife's father and his representatives, the obligor was not at liberty to pay it or settle the lands at his election, but must perform the agreement to settle.² If the sum reserved be single, and the subject of the stipulation in its nature continuing or recurring, the sum will be regarded as a penalty.³ The plaintiff and defendant being partners, and it having been agreed by them that the plaintiff should alone conduct the business, and that the defendant should have the use of a certain room in the house whenever he desired, and the plaintiff having given the defendant a bond in five hundred pounds, it was held to be a security, and the court restrained a suit for the penalty, and granted an issue *quantum damnificatus* to ascertain the damages.⁴

§ 26. *Course pursued when penal sum is enforced by injunction.*—When specific performance of stipulations protected by a penal sum is enforced by injunction, the court on an interlocutory application to dissolve the injunction will not decide the question whether the sum is a penalty or liquidated damages, but will only consider whether there is a *prima facie* case for an injunction, and

¹ Howard v. Hopkins, 2 Atk., 371.

² Chilliner v. Chilliner, *supra*; Roper v. Bartholomew, 12 Price, 797.

³ French v. Macale, 2 Dr. and W., 269. ⁴ Sloman v. Walter, 1 Bro. C. C., 418.

whether more mischief will be done by granting than by withholding it.¹ As a party is not entitled under the contract to both the liquidated damages or penalty, and to specific performance, or to an injunction, for the same breach, the court, in granting an injunction, will impose on the plaintiff the terms of not claiming the damages or penalty; and a recovery of the liquidated damages for a breach will preclude him from afterward obtaining an injunction.²

§ 27. *Rule in relation to agreements to build.*—Building contracts will not in general be specifically enforced.³ There is said to be a dictum of Justice Jenny to the contrary, in a case decided in the eighth of Edward IV.; and Lord Thurlow maintained the same view.⁴ The rule is now, however, well settled, on account of the uncertainty of such contracts, and the inability of the court to carry them out.⁵ It has been said, “There is no case of a specific performance decreed of an agreement to build a house, because if A. will not do it, B. may. A specific performance is only decreed where the party wants the thing in specie, and cannot have it in any other way.”⁶ Specific performance was refused of a contract for the making of a branch railroad, which was entered into during the pendency of a bill before Parliament, when several of the directors thought of withdrawing the bill, and, as the plaintiff alleged, would have done so but for the contract in question.⁷ Where a person agreed to grant a lease as soon as the other party built a house of a certain value,

¹ Cole v. Sims, 5 De G. M. & G., 1. ² Sauter v. Ferguson, 1 M. & G., 286.

³ Wilkinson v. Clements, L. R. 8, Ch. 96; City of London v. Southgate, 38 L. J. C., 141; Mastin v. Halley, 61 Mo., 196; Ross v. Union Pacific R.R. Co., 1 Woolw., 26.

⁴ Buxton v. Lister, 3 Atk., 385; City of London v. Nash, Ib., 512; S. C. n, Ves. Sen. 12.

⁵ Paxton v. Newton, 2 Sm. & G., 437; Lucas v. Commerford, 3 Bro. C. C., 166; Mosely v. Virgin, 3 Ves., 184.

⁶ Per Kenyon, M. R., in Errington v. Aynesley, 2 Bro. C. C., 343.

⁷ South Wales R.R. Co. v. Wythes, 1 K. & J., 186; S. C. 5, De G. M. & G., 880.

“according to a plan to be submitted to and approved by the lessor,” specific performance at the suit of the lessor was refused.¹ A decree for the specific performance of a contract to expend a certain sum in building, which was uncertain as to the particulars of the building, was denied.² But the execution of a lease to contain covenants to build according to an agreement to that effect, will be decreed so as to give the lessor a remedy upon the covenants.³ It is said that “in Scotland many contracts to build are specifically performed, in respect of which equity would decline jurisdiction in England, the Scotch courts appointing some properly qualified person under whose superintendence the work is directed to be executed.”⁴

§ 28. *When building contracts will be enforced.*—If the work to be done is clearly defined, and the plaintiff has a material interest in its execution, which cannot be adequately compensated in damages, specific performance will be decreed.⁵ Where a man, having entered into articles with a builder, died before performance of the contract, it was held that his heir might maintain a suit against the

¹ *Brace v. Wehnert*, 25 Beav., 348.

² *Moseley v. Virgin*, 3 Ves., 184.

³ *City of London v. Southgate*, 38 L. J. C., 141.

⁴ *Fry on Specif. Perform.*, p. 20; *Clark v. Glasgow Assurance Co.*, 1 M'Queen, 668.

⁵ It was maintained by an eminent English judge that where the covenant to build or rebuild is definite as to size, materials, etc., it ought to be enforced. Lord Rosslyn in *Moseley v. Virgin*, *supra*. Mr. Story takes the same view, on the following grounds: “If the suit is brought before any building or rebuilding by the party claiming the benefit of the covenant, the damages must be quite conjectural, and incapable of being reduced to any absolute certainty; and if the suit is brought afterward, still the question must be left open, whether more or less than the exact sum required has been expended upon the building, which inquiry must always be at the peril of the plaintiff. Such a covenant does not admit of any exact compensation in damages from another circumstance: the changing value of the materials at different times, according to the various demands of the market. It seems against conscience to compel a party, at his own peril, to advance his money to perform what properly belongs to another, when it may often happen, either from his want of skill or means, that at every step he may be obliged to encounter personal obstacles, or to make personal sacrifices, for which no real compensation can ever be made. In all such cases, courts of equity ought not to decline the jurisdiction, whenever the remedy at law is doubtful in its nature, extent, operation, or adequacy.” *Story's Eq. Juris.*, sec. 728. Referring to *Stuyvesant v. Mayor*, etc., of New York, 11 Paige Ch., 414.

personal representative of the ancestor and the builder, the contract savoring of the realty.¹ And specific performance of a contract to build was decreed against a tenant who, having agreed to rebuild the farm-house, had done so on his own land instead of on his landlord's.² In another case the defendant was compelled to alter the elevation of a house which had been erected in contravention of a covenant.³ Where a contract was made between several parties to build a tavern at their joint risk and expense, and for their joint benefit, and one of the parties furnished the land to build upon, and performed his part of the contract, it was held that he was entitled to a decree for specific performance; the others objecting that a change of circumstances had rendered the project unadvisable.⁴ A railroad company may be compelled to perform their agreement to construct and maintain an archway under their line to connect lands of the plaintiff severed by the railroad;⁵ or to make such roads and ways through the land as may be necessary to connect severed portions.⁶

§ 29. *Where the agreement to build is between vendor and vendee.*—There is a distinction between a contract to build a house and a contract of sale, with a stipulation to erect a building or do certain work. Where A. agreed to sell land to B., and to make a road of which A. was to have the use, and B. was to erect a house on the land which should cost three thousand pounds, it was held that the contract might be specifically enforced.⁷ By the terms of a written agreement, A. was to do the brick-work and plastering upon sixteen tenements, and, on completion, B. was to give to A. a deed of three of the tenements. A. having performed his part of the contract, it was held that

¹ Holt v. Holt, 2 Vern., 322.

² Pembroke v. Thorpe, 3 Swanst., 437, *note*.

³ Franklyn v. Tuton, 5 Mad., 469.

⁴ Birchett v. Bolling, 5 Munf. Va., 442.

⁵ Storer v. Gt. Western R.R. Co., 2 Y. & C. C. C., 48.

⁶ Sanderson v. Cockermouth & Workington R.R. Co., 11 Beav., 497.

⁷ Wells v. Maxwell, 32 Beav., 408; Affd. 9, Jur. N. S., 1021.

he was entitled to a decree; that, as the houses were of equal value, the court might designate which of them should be conveyed; and that A. was entitled to a deed in fee simple, with a covenant against incumbrances made or suffered by B.¹ Where a railroad company purchased land upon the terms of making thereon a road and wharf, specific performance was decreed.² An agreement by a railroad company with the owner of land through which the road was to pass, to construct and maintain a siding, with necessary approaches for public use, was enforced as to the construction of the siding.³ So, where a railroad company agreed with the vendor of land that there should be forever thereafter maintained thereon a first-class station, it was decreed that the company should supply the necessary accommodation for such a station, to be ascertained at chambers.⁴ When the suit is brought by the purchaser, the contract is sometimes virtually enforced by permitting the purchaser to do the work, and to deduct the cost from the purchase-money.⁵

§ 30. *Effect of part performance on agreement to build.*—The fact that the contract has been partly performed, and the parties cannot be restored to their original position, will sometimes induce the court to enforce it when it would not otherwise have done so. Where, on a sale of real estate, the purchasers covenanted to make a road and erect a market-house on the land without delay, and they took possession and made the road, but neglected to build the market-house, it was held that they must perform their contract in specie.⁶ In the foregoing case, the purchasers not

¹ Ellis v. Burden, 1 Ala., 458.

² Wilson v. Furness R.R., L. R. 9, Eq. 28.

³ Lytton v. Gt. Northern R.R. Co., 2 K. & J., 394.

⁴ Hood v. Northeastern R.R. Co., L. R. 8, Eq. 666.

⁵ Wells v. Maxwell, *supra*.

⁶ Price v. Corp. of Penzance, 4 Hare, 506. In a deed from A. to B., A. reserved, from the premises conveyed, the right to draw a certain quantity of water at all times when B. or his successor should not be using sufficient water for the accommodation of the factory below which was owned by A. There was a provision in the deed, in connection with the reservation, that B. and his

only had the full benefit of the contract, but the vendor, having parted with the land, could not do the work which the purchasers had contracted to do, and so ascertain the amount of damages sustained by their non-performance. But the court cannot grant relief on the ground of part performance, when it has no jurisdiction over the original subject matter of the contract.¹

§ 31. *Rule as to agreements to repair.*—The specific performance of covenants to repair will not usually be decreed, for the reason that, with rare exceptions, there is an ample remedy at law.² So, relief will not be granted against the forfeiture by a tenant for a breach of a covenant to repair, when the repairs must be made as a condition of the relief, and it is necessary for the court to entertain the question of the sufficiency of them.³ Where, however, a lessee covenanted to repair after notice, and the lessor, having given notice, afterward waived the default of the lessee, by continuing to negotiate, the court relieved against the forfeiture.⁴ Specific performance of a covenant, in the lease of

successor should keep a spout ten inches square at the bottom of the ditch leading to his grist-mill, to which A. should at all times have access, for the purpose of exercising the right reserved in the deed. A. having conveyed his factory and the land connected with it to C., together with all the rights and privileges specified in the deed from A. to B., it was held that C. might maintain a suit in equity to compel B. to put in the spout. *Randall v. Latham*, 36 Conn., 48.

¹ *South Wales R.R. Co. v. Wythes*, 1 K. & J., 186.

² *City of London v. Nash*, 3 Atk., 512; *Lord Abinger v. Ashton*, L. R. 17, Eq. 376. An agreement to make repairs on a mill, pursuant to specifications, will not be specifically enforced, for the reason that the doing so would be difficult, if not impracticable. *Reed v. Vidal*, 5 Rich. Eq., 289. A court of equity has no jurisdiction to enforce specific performance of an agreement by a lessor, contained in the lease, to repair damages caused by a fire. *Beck v. Allison*, 56 N. Y., 367. Were the court to attempt to do this, it must first determine what repairs are to be made, when, and how, and enforce performance by attachment as for contempt, in case of disobedience. "Then will arise the question, whether there has been substantial performance, and, if found not, whether the defendant has any such excuse therefor, as will exonerate him from the contempt charged; and in case of performance, but not in as beneficial a manner as adjudged, the compensation that should be made for the deficiency. It is obvious that the execution of contracts of this description, under the supervision and control of the court, would be found very difficult, if not impracticable, while the remedy at law would, in nearly all, if not in all cases, afford full redress for the injury." *Ibid.*, per Grover, J.

³ *Hill v. Barclay*, 16 Ves., 59.

⁴ *Hughes v. Metropolitan R.R.*, 46 L. J. C., 583.

a gravel pit, to make good the ground at the end of the lease, was refused, for the reason that the matter in controversy was "nothing more than the sum it would cost to put the ground in the condition in which, by the covenant, it ought to be."¹ But specific performance of an agreement to execute a lease to contain a covenant to repair, will be decreed, so as to give a remedy for not repairing.² Where the repairs of a canal and arch for the benefit of the lessee of a mill interested in them, were incidental and necessary to the enjoyment of a right of the plaintiff, which was the subject of a distinct covenant, a mandatory injunction was granted against the violation of the right by the continuance of the non-repair.³ Specific performance will not be decreed of a charter party providing for the choice of the crew and the repairing of a ship to make it seaworthy;⁴ nor of the covenants in a farming lease as to repairs, fences, and the course of husbandry;⁵ nor of a contract to allow the use of a dock for the repair of a ship.⁶ Upon a bill filed by a lessor for the specific performance of a contract to take a lease if the house were put "in thorough repair," and the drawing-rooms "handsomely decorated, according to the present style," it was held that the terms employed were too indefinite to be enforced.⁷ Specific performance of a covenant by a landlord to make repairs may be decreed, when it appears that the tenant will otherwise be permanently injured.⁸ Where, in a contract for a lease, it was stipulated that the lessor should put the house "in substantial and decorative repair," specific performance was decreed in behalf of the lessee, with an inquiry whether the repairs had been properly executed, and, if not, then an inquiry as to damages.⁹ Equity will enforce specific performance by

¹ Flint v. Brandon, 8 Ves., 159.

² Paxton v. Newton, 2 Sm. and G., 437.

³ Lane v. Newdigate, 10 Ves., 192.

⁴ De Mattos v. Gibson, 4 De G. and J., 276.

⁵ Rayner v. Stone, 2 Eden., 128.

⁶ Merchant's Trading Co. v. Banner, L. R. 12, Eq. 18.

⁷ Taylor v. Portington, 7 De G. M. and G., 328.

⁸ Valloton v. Seignett, 2 Abb. Pr., 121.

⁹ Samuda v. Lawford, 8 Jur. N. S., 739.

the defendant of a covenant to make improvements upon his own land, where the injury to the complainant from the breach of the covenant is such that it cannot be adequately compensated in damages.¹

§ 32. *Agreement to insure*.—Specific performance may be decreed of a contract to insure; and, if a loss has occurred, the court will not turn the plaintiff over to an action at law, but will decree payment.²

§ 33. *Agreements for personal services*.—Courts of equity formerly entertained jurisdiction to enforce contracts of hiring and service, notwithstanding the difficulty of carrying out such contracts. Thus, specific performance was decreed of a contract entered into by the East India Company to employ a man as a packer.³ So, where a skilled person entered into a contract with a company engaged in the manufacture of brass, whereby he bound himself during his life as their manager, the company agreeing to pay him a certain sum for every hundred weight of brass wire made by him, or by any other person, for them during his life, payment was decreed for his past services, and specific performance for the future, upon his again taking charge of the works pursuant to the contract.⁴ But “it is obvious that if the notion of specific performance were applied to ordinary contracts for work and labor, or for hiring or service, it would require a series of orders, and a general

¹ *Stuyvesant v. Mayor, etc., of New York*, 11 Paige Ch., 414. An agreement in a written lease that the lessee shall, after the expiration of the term, have fair compensation for all improvements made by him upon the premises, is such an agreement as equity will enforce against the lessor, provided specific performance is capable of being made, and the complainant can have adequate relief only in equity. But alleged infringements on the rights of the lessee, during his term, are not proper subjects to be drawn in question, and will not be allowed by the court. *Berry v. Van Winkle*, 2 N. J. Eq., 1 Green, 269.

² *Mead v. Davison*, 3 Adol. & El., 303; *Carpenter v. Mu. Safety Ins. Co.*, 4 Sandf. Ch., 408; *Perkins v. Washington Ins. Co.*, 4 Cow., 645; 23 Wend., 18, 25; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. U. S., 405; *Union Mu. Ins. Co. v. Commercial Mu. Ins. Co.*, 2 Curtis, C. C., 524; 2 Phil. on Ins., 582; 1 Duer on Ins., 66.

³ *East India Co. v. Vincent*, 2 Atk., 83.

⁴ *Ball v. Coggs*, 1 Bro. P. C., 140. As to the validity of contracts of service for life, see *Wallis v. Day*, 2 M. and W., 273.

superintendence, which could not conveniently be undertaken by any court of justice.”¹ The specific performance of a contract involving personal services, skill, or confidence, will not, therefore, as a rule, be decreed; nor a party be enjoined from terminating such a contract.² The following contracts, specific performance of which was refused, may be mentioned as examples:—to report law cases for publication;³ to furnish drawings for maps;⁴ to perform at a theatre;⁵ as to the work of an apprentice, or instruction by the master;⁶ to employ the lessor of a wharf as manager in the business—the court refusing to enforce the contract even as to the lease, because it could not enforce the employment;⁷ as to the working of quarries;⁸ and coal mines.⁹ Where parties agreed for a certain sum to work the line of a railroad, and keep the engines and rolling stock in repair, a decree for the specific performance of the contract was refused. “We are asked,” said the court, “to compel one person to employ against his will, another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still, if the two do not agree, and good people do not always agree, enormous mischief might be done.”¹⁰

§ 34. *Agreements capable of being revoked.*—Specific performance will not be decreed of a revocable contract, for

¹ Selborne L. C. in *Wolverhampton and W. R.R. v. London and N. W. R.R.*, L. R. 16, Eq. 439.

² *Stocker v. Brocklebank*, 3 M'n. and G., 250; *Chinnock v. Sainsbury*, 30 L. J. C., 409; *Pickering v. Bishop of Ely*, 2 Y. and C. C. C., 249.

³ *Clarke v. Price*, 2 J. Wils., 157.

⁴ *Baldwin v. Useful Knowledge Soc.*, 9 Sim., 393.

⁵ This has been held in several cases in this country. But in England, a contract to perform at a certain theatre will now, it seems, be enforced by an injunction restraining the defendant from performing anywhere else, though it was formerly held otherwise. See *Post*, § 117.

⁶ *Webb v. England*, 29 Beav., 44. ⁷ *Ogden v. Fossick*, 32 L. J. C., 73.

⁸ *Booth v. Pollard*, 4 Y. and C. Ex., 61.

⁹ *Pollard v. Clayton*, 1 K. and J., 462.

¹⁰ *Knight Bruce L. J.*, in *Johnson v. Shrewsbury & Birmingham R.R. Co.*, 3 De G. M. and G., 914.

the reason that it would be an idle exercise of power by the court.¹ Where the registrar of a consistory court agreed to grant a deputation of his office, it was held that as such a deputation was in its nature revocable, it could not be enforced.² The rule under consideration is applicable to agreements to enter into partnership which do not specify the duration of the partnership, it being competent for either party to dissolve the relation whenever he sees fit.³ Specific performance was accordingly refused of an agreement entered into with a company to take a certain number of shares and to execute the deed of settlement when required, the defendant being able by the rules of the company, to withdraw within fourteen days after becoming a partner.⁴ It is on the same principle, that specific performance will not be decreed of a contract which contains such a covenant that the party objecting to the performance, may immediately deprive the other of the benefit of the agreement, as a contract for a lease that is to contain a proviso for re-entry on the breach of a covenant which the plaintiff has already broken.⁵ A violation of the articles during the partnership may, however, be restrained by injunction⁶:—such as an intentional and continued neglect to

¹ *Express Co. v. R.R. Co.*, 9 Otto, 191.

² *Wheeler v. Trotter*, 3 Swanst., 174. *Note*.

³ *Hercy v. Birch*, 9 Ves., 357; *Scott v. Rayment*, L. R. 7, Eq. 112; *Meason v. Kaine*, 63 Pa. St., 335. Plaintiff and defendant entered into an agreement whereby the latter was to convey an undivided interest in real and personal property held by him in common with third persons, and the plaintiff was to become, for an indefinite time, a partner with the defendant and such third persons in operating the property. It was further provided that the defendant should advance, from time to time, the plaintiff's quota of the funds necessary for the business and the improvement of the property; that the plaintiff should manage and direct the business and improvements, and employ his time, skill, judgment, and experience, therein, and that the amount advanced for his benefit in carrying on the business, should be paid by his skill and services in the concern and the gains obtained in the enterprise. Held, that as the agreement was incapable of being enforced on both sides, the decree of the court below dismissing the bill must be affirmed with costs. *Birch v. Smith*, 29 Mich., 166.

⁴ *Sheffield Gas Consumers Co. v. Harrison*, 17 Beav., 294.

⁵ *Jones v. Jones*, 12 Ves., 188.

⁶ *Dietrichsen v. Cabburn*, 2 Phill., 52. "It is impossible to make persons who will not concur, carry on business jointly for their common advantage. It is that which makes everything of this kind exceedingly uncertain. It is that which

insert the name of a partner in the firm name ;¹ or the raising of money by one of the partners for his private use on the credit of the firm ;² or engaging in other business contrary to agreement ;³ or seeking unreasonably and in bad faith, a sudden dissolution which will be productive of irreparable injury ;⁴ or doing any acts during the continuance of the partnership injurious to it.⁵ The court will secure to a partner an interest in property to which, by the partnership agreement, he is entitled.⁶ So, the execution of a deed of partnership, according to the terms agreed, will be decreed in order to secure the rights of the parties under it ;⁷ but not unless the terms of the partnership have been distinctly settled for a definite time.⁸ A shareholder in a company may be specifically compelled to take the shares allotted to him.⁹ An agreement that, upon dissolution, a certain book of the firm shall belong to one of the members, and the other have a copy of it, may be enforced.¹⁰

A contract for a partnership to continue for a definite period will be specifically enforced, and the parties be decreed to execute a proper instrument for that purpose ; and, if necessary, the defendant will be restrained from carrying

makes the court, on all such occasions, exceedingly anxious ; an anxiety I believe that has been felt by every Judge who has ever sat in a court of equity, that when these disputes do arise, the parties should, if possible, come to some arrangement between themselves to do that for the common benefit, which the court cannot do otherwise than at the common expense. But if the parties insist on having a declaration of their rights, the court has over and over again entertained the jurisdiction, and must entertain the jurisdiction, unless some one or two, or several partners, are to be permitted to do just what they like with the partnership rights and interests." Lord Langdale M. R. in *England v. Curling*, 8 Beav., 129.

¹ *Marshall v. Colman*, 2 J. and W., 266.

² *Ibid.*

³ *Somerville v. Mackay*, 16 Ves., 382.

⁴ *Chavany v. Sommer*, 1 Swanst., 511. *Note.*

⁵ *Charlton v. Poulter*, 19 Ves., 148 ; *Goodman v. Whitcomb*, 1 J. and W., 389.

⁶ *Somerby v. Buntin*, 118 Mass., 279.

⁷ *England v. Curling*, *supra* ; *Wilson v. Campbell*, 10 Ill., 383 ; *Whitworth v. Harris*, 40 Miss., 483.

⁸ *Hercy v. Birch*, 9 Ves., 357.

⁹ *Pinkett v. Wright*, 2 Hare, 130 ; *New Brunswick R.R. v. Muggerridge*, 4 Drew, 686.

¹⁰ *Lingen v. Simpson*, 1 Sim. and Stu., 600.

on the business under the partnership style with other persons, and' from publishing a notice of dissolution.' Specific performance was decreed of a contract to execute a mortgage containing an absolute power of sale, in consideration of money due, though with hesitation on the part of the court, as the mortgagee might sell the property immediately.² Contracts of partnership which are illegal as amounting to sales of office, or contravening the laws regulating trade, or otherwise, will of course not be enforced.³ So, where the agreement has reference to a business concerning which the court has no power to enforce its own orders, it will decline to interfere.⁴

§ 35. *Rule as to the sale of a good-will.*—Specific performance of a contract for the sale of the good-will of a business disconnected from the business premises, or from any specific stock in trade, or trade secret, will not be decreed, on account of the uncertainty of the subject matter, and the consequent inability of the court to deal with it.⁵ But "where a good-will is entirely or mainly annexed to the premises, and the contract is for the sale of the premises and good-will, such a contract is a fit matter for a decree in a suit for specific performance;"⁶ "the probability being

¹ *England v. Curling*, *supra*. For forms of a decree and injunction, in such cases, see *Ibid*. In this case, Lord Langdale said that the agreement for a partnership was binding on the parties and ought to be specifically enforced, and he so directed. But the decree only went in terms to the ordering of a proper partnership deed to be executed, and the continuing of an injunction which had been obtained against one partner acting contrary to his agreement. The circumstances of the case made it highly inequitable for the partner thus to do. But in the ordinary case of a mere executory agreement for a partnership, it is questionable whether such an injunction would be granted.

² *Hermann v. Hodges*, L. R. 16, Eq. 18.

³ *Hughes v. Statham*, 4 B. & C., 187; *Knowles v. Houghton*, 11 Ves., 168.

⁴ *Newberry v. James*, 2 Mer., 446. See *Williams v. Williams*, 3 Ib., 157; *Green v. Folgham*, 1 Sim. & Stu., 398; *Yovatt v. Wynyard*, 1 J. & W., 394; *ante*, § 33; *post*, §§ 49, 117.

⁵ *Baxter v. Connolly*, 1 J. & W., 576; *Bozon v. Farlow*, 1 Mer., 459; *Coslake v. Till*, 1 Russ., 376.

⁶ *Kindersley, V. C.*, in *Darbey v. Whitaker*, 4 Drew, 134; *Chissum v. Dewes* 5 Russ., 29; *Mummery v. Paul*, 1 C. B., 316.

that the old customers will resort to the old place.”¹ And where the seller of the good-will of a business covenants not to carry on the same trade within certain limits, a breach of the covenant will be restrained by injunction.² This was done in a case where a solicitor, in selling his business, agreed not to practice as a solicitor in any part of Great Britain for twenty years.³ An agreement, for a valuable consideration, not to practice medicine within twelve miles of a certain place, was held not unreasonable, and a breach of it restrained.⁴ A coach-maker, having sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from Reading to London, Lord Eldon, upon a bill filed for specific performance of the agreement, and for an injunction, granted the injunction until the answer.⁵ If the good-will consists of a trade secret, the seller will be restrained from disclosing or using it in fraud of the buyer.⁶ The breach of a covenant by the purchaser of land, that the vendor should have the exclusive right to supply beer to any public-house built thereon, was restrained by injunction.⁷ But where a party agreed not to sell water from a well to the injury of certain water-works, the court declined to interfere, for the

¹ Lord Eldon in *Cruttwell v. Lye*, 17 Ves., 346. As to the nature of a good-will, see *Potter v. Commrs. of Revenue*, 10 Exch., 147; *Allison v. Monkwearmouth*, 4 Ell. & Bl., 13.

² But not from setting up a similar business. *Cruttwell v. Lye*, *supra*; *Shackle v. Baker*, 14 Ves., 468. Equity will restrain a person from setting up a trade in opposition to his agreement, although he has agreed not to do so under a penalty, even when he has paid the penalty; a penalty being a mere security for the performance of the contract, and not the price for doing what a man has expressly agreed not to do. So the naming of a sum as liquidated damages would not in itself conclusively show that the parties contemplated the right to do the act upon payment of the amount. To have that effect, it must appear from the whole contract that the stipulated sum was to be paid in lieu of performance of the agreement, and was an alternative which the covenantor had the option to adopt. *Ropes v. Upton*, 125 Mass., 258. See *Dooley v. Watson*, 1 Gray, 414; *Hardy v. Martin*, 1 Cox, 26.

³ *Whittaker v. Howe*, 3 Beav., 383.

⁴ *McClurg's Appeal*, 58 Pa. St., 51. See *Butler v. Bursleson*, 16 Vt., 176; *Beard v. Dennis*, 6 Ind., 200.

⁵ *Williams v. Williams*, 2 Swanst., 253.

⁶ *Bryson v. Whitehead*, 1 Sim. & Stu., 74.

⁷ *Catt v. Tourle*, L. R. 4, Ch. 654.

reason that it would be necessary to inquire every time the water was sold, whether it was done with or without injury.¹ An agreement was entered into by several persons in the same trade, that one of them should make an offer for a public contract at a less price than the rest, and if successful, should take certain quantities of the required materials from the others. One of them having made an offer in breach of the agreement, and obtained a contract, an injunction was granted restraining him from carrying it out.² An agreement not to write dramatic pieces for any other theatre than the Haymarket, was enforced by injunction.³ So, where an author, having sold a work, covenanted with the purchaser not to publish any other work to prejudice the sale of it, Sir John Leach, V. C., restrained the publication of another work by the vendor on the same subject, although such work was not a piracy of the original work; and Lord Eldon restrained the publishers of the second work, upon proof that they had notice of the covenant.⁴ The sale of a patent will be enforced by compelling the seller to convey, and the buyer to pay the price.⁵ The legality of a stipulation, in an agreement for the sale of the business of an attorney, to give to the party intending to carry on the business, the benefit of the name or recommendation of the party not engaged in it, was formerly questioned.⁶ It is now, however, well settled, not only that such a contract is valid, but that it may be specifically enforced by injunction, or otherwise.⁷ The sale of the good-

¹ Collins v. Plumb, 16 Ves., 454.

² Jones v. North, L. R. 19, Eq. 426.

³ Morris v. Coleman, 18 Ves., 437.

⁴ Barfield v. Nicholson, 2 Sim. & Stu., 1.

⁵ Cogent v. Gibson, 33 Beav., 557.

⁶ Candler v. Carden, Jac., 231; Thornbury v. Bevell, 1 Y. & C. C. C., 584; and see Gilfillan v. Henderson, 2 Cl. & Fin., 1.

⁷ Bunn v. Guy, 4 East., 190; Whittaker v. Howe, *supra*; Aubin v. Holt, 2 K. & J., 66. In Bozon v. Farlow, 1 Mer., 473, Sir William Grant doubted the propriety of assisting a contract to sell an attorney's business, from its being a kind of breach of confidence on the part of the attorney, and against public policy. These doubts have often been entertained by other judges; but such agreements have been sanctioned in numerous instances. See Nichols v. Stretton, 10 Q. B., 346; Mumford v. Gething, 7 C. B. N. S., 305. In Ward v. Byrne, 5

will of a trade, without any express provision in restraint of carrying on the same trade in the neighborhood by the person selling, will not entitle the court to restrain the vendor from carrying on the trade in the vicinity, unless the circumstances amount to actual fraud.¹

§ 36. *Enforcement of agreements for renewal.*—A covenant for the renewal of a lease may be specifically enforced,² though it was formerly held otherwise.³ A lease provided that upon the expiration of the term the lessor should either pay the appraised value of the buildings, or renew the lease upon such terms as he should think proper; and if the terms should not be acceptable to the lessee, he might remove the buildings. The lessor having offered to renew at an exorbitant price, upon a bill filed by the lessee, the court decreed a renewal of the lease at a reasonable rent.⁴ But a covenant or agreement to renew on the part of the defendant must be distinctly and clearly shown, and it must appear that the plaintiff has not been wanting in diligence.⁵ It will not be construed as amounting to an

M. & W., 548, a coal-merchant's clerk having bound himself not to follow or be engaged in the business of coal-merchant for the space of nine months after he should leave the service of his employers, the bond, upon mature deliberation, was held void. A contract not to manufacture medicine was held valid. *Gillis v. Hall*, 2 Brewst., 342.

¹ *Cruttwell v. Lye*, 17 Ves., 335; *Williams v. Williams*, 3 Mer., 157; *Canham v. Jones*, 2 V. & B., 208.

² *Furnival v. Crew*, 3 Atk., 83; *Iggulden v. May*, 9 Ves., 325; *Willan v. Willan*, 16 Ib., 84; *Brown v. Tighe*, 2 Cl. & Fin., 396; *Carr v. Ellison*, 20 Wend., 178.

³ *Somerville v. Chapman*, 1 Bro. C. C., 61; *Tritton v. Foote*, 2 Ib., 636; *Rees v. Dacre*, cited 9 Ves., 332. Lord Thurlow thought that where a man entitled to an estate of inheritance agreed to make leases with a covenant for perpetual renewal, each lease to contain the same covenant forever, it could not be supposed that this was intended, and, therefore, it was not such a covenant as would be executed by the court. But Lord Eldon maintained that decided cases had established the rule that covenants of this character were to be specifically performed. *Willan v. Willan*, *supra*.

⁴ *Whitlock v. Duffield*, 2 Edw. Ch., 366.

⁵ Where the lease provided for renewal on the dropping of one life, and the application for renewal was delayed until two had expired, it was held that the lessee had been guilty of such neglect as to disentitle him from specific performance. *Bayley v. Corp. of Leominster*, 3 Bro. C. C., 529. See *Baynham v. Guy's Hospital*, 3 Ves., 295. Although equity will relieve in case of mere lapse of time without misconduct in the lessee, or where the lessee has lost his right by the fraud of the lessor, yet it will not do so when there has been wilful neg-

agreement for a perpetual renewal unless the intention is free from all ambiguity.¹ In the following cases the covenant was held to be for a perpetual renewal :—To grant such further lease as the lessee should desire ;² to grant a new lease or leases, and so to continue the renewing of such lease or leases ;³ a lease for the lives of A., B., and C., with a covenant, on the death of any one of them, to grant a new lease for the lives of the survivors, and a new life to be named, such lease to contain all the covenants, including “this present covenant,” which were contained in the original lease.⁴ The proper form of a lease by trustees, in pursuance of their testator’s covenant for perpetual renewal, even where the covenant stipulates that in every future lease there shall be inserted the like covenant for renewal, is for the lease to recite the covenant, and to declare that the new lease is granted in pursuance of it.⁵ A covenant for a renewed lease, to contain all the covenants in the original lease, does not import the insertion in the new lease of such a covenant for renewal as will make the original covenant operate as a perpetual renewal.⁶ A mere covenant to renew a lease at a specified rent does not carry with it the covenants of the old lease.⁷ Where there is a covenant to renew a lease, the renewed lease need not contain a covenant for further renewal, unless the original lease contains an express covenant for perpetual renewal.⁸

lect or refusal to renew. *Lennon v. Napper*, 2 Sch. & Lef., 682 ; *Bateman v. Murray*, cited 4 Bro. C. C., 417 ; *Chesterman v. Mann*, 9 Hare, 206. Notwithstanding there has been some *laches* on the part of the lessee, if it is excused by fraud, surprise, unavoidable accident, or ignorance which is not wilful, specific performance will be enforced when the lessor’s interest has not been prejudiced by the delay. *Eaton v. Lyon*, 3 Ves., 690. As to whether a breach of covenants in the lease will bar a renewal, see *Trant v. Dwyer*, 2 Bli. N. S., 11.

¹ *Brown v. Tighe*, *supra* ; *Baynham v. Guy’s Hospital*, *supra*.

² *Bridges v. Hitchcock*, 7 East., 245.

³ *Furnival v. Crew*, *supra*.

⁴ *Hare v. Burges*, 4 K. & J., 45.

⁵ *Copper Mining Co. v. Beach*, 13 Beav., 478 ; *Hodges v. Blagrove*, 18 Ib., 404.

⁶ *Hyde v. Skinner*, 2 P. Wms., 196 ; *Tritton v. Foote*, *supra* ; *Russell v. Darwin*, 2 Bro. C. C., 639, *note* ; *Moore v. Foley*, 6 Ves., 232 ; *Harnett v. Yielding*, 2 Sch. & Lef., 549.

⁷ *Willis v. Astor*, 4 Edw. Ch., 594.

⁸ *Rutgers v. Hunter*, 6 Johns., 215 ; *Phyfe v. Wardell*, 5 Paige Ch., 268.

The assignee of a lease is entitled to the specific performance of a covenant to renew.¹ A covenant by a lessor to extend a lease, without naming the amount of rent, cannot be enforced in equity.²

§ 37. *Rule as to agreements concerning expectancies.*—The possibility of succession has been held at law not to be a valid subject of disposition, and such a disposition by the heir would be void at law, though the inheritance afterward fell to him.³ Contracts of this nature were prohibited by the Roman law.⁴ But an agreement to sell an estate, if it should be devised to the vendor by a person then living, was upheld by the Queen's bench.⁵ In equity such contracts are regarded as valid, notwithstanding they may seem to have defeated the intentions of testators or to have been in fraud of parental authority.⁶ In a very early case, a covenant to settle an estate to which the covenantor had only an expectancy as heir, was specifically enforced after the descent of the lands.⁷ A. and B. married two sisters, the presumptive heiresses of a very wealthy man who had made and revoked several wills, but who ultimately devised a large property to A. and only a small one to B. Before the will was executed, A. and B. had entered into an agree-

¹ Robinson v. Perry, 21 Ga., 183. ² Robinson v. Kettletas, 4 Edw. Ch., 67.

³ Jones v. Roe, 3 Term. R., 93; Shep. Touch., 319; McCracken v. Wright, 14 Johns., 193; Davis v. Hayden, 9 Mass., 504.

⁴ Pothier Tr. Des. Oblig. Pt. 1, Ch. 1, Sec. 4.

⁵ Cook v. Field, 15 Q. B., 460.

⁶ In Varick v. Edwards, 11 Paige Ch., 290, a formal conveyance of a possibility or expectancy, though it had been ruled inoperative at law, was held good in equity. In McWilliams v. Neely, 2 Serg. & R., 507, Tilghman, Ch. J., said that "If one enter into articles to convey in case subsequent events should make it lawful, there could be no doubt that in equity he would be decreed to convey when he afterward acquired the power." And see to the same effect Anderson v. Lewis, 1 Freem. Miss. Ch., 178; Baylor v. Com., 40 Pa. St., 37; Power's Appeal, 63 Ib., 443; Mastin v. Marlow, 65 N. C., 695. *Contra*, Lowry v. Spear, 7 Bush. Ky., 451. An agreement by a husband to convey land belonging to his wife in which he is entitled to a life estate by the curtesy, the wife refusing to execute a deed, cannot be specifically enforced; nor can he be compelled to convey his life estate in the same. McCann v. Jones, 1 Rob. Va., 256. Equity will not decree specific performance of an executory verbal contract where it depends on a future event which may never happen. Bradley v. Morgan, 2 A. K. Marsh, 369.

⁷ Wiseman v. Roper, 1 Rep. in Ch., 154.

ment for the equal division between them of what should be left to each. This agreement was specifically enforced, the court remarking that the agreement was not disappointing the intention of the testator, as he did not design to put it out of either of the devisees' power to dispose of the estate after it should come to him, but, on the contrary, by implication, gave them such power.¹ So, likewise, the conveyance of a contingency or possibility on the death of a sister unmarried was upheld.² The plaintiff and the defendant, the celebrated John Horne Tooke, entered into a parol agreement to divide what they should obtain from a testator, in pursuance of which the plaintiff had given to the defendant Tooke a note for four thousand pounds, which the latter had indorsed to the other defendant, Sir Francis Burdett, for value. It was held that the plaintiff had no equity to follow the note into the hands of the purchaser. It is said that the court expressed doubts whether the transaction between the plaintiff and defendant Tooke was not a fraud on the testator, and whether the court would at any rate assist in specifically enforcing such an agreement. But "the case has usually been treated as an authority for the validity of contracts relating to expectancies."³ Two sons entered into an agreement for an equal division of what they might derive from their father, either during his life or after his decease, by will or otherwise. It was urged that this was a contrivance on the part of the sons to protect themselves from the consequences of misbehavior and in fraud of parental authority. The agreement was, however, specifically enforced; the court considering that as the testator had the power to give property to his sons without the power of alienation, which he did not choose to do, he had allowed it to become liable to all of their antecedent contracts.⁴ So, specific performance

¹ *Beckley v. Newland*, 2 P. Wms., 182; *S. P. Hobson v. Trevor*, *ib.*, 191; but see *Mercier v. Mercier*, 50 Ga., 546.

² *Wright v. Wright*, 1 Ves., Sen. 409. Per Lord Hardwicke.

³ *Harwood v. Tooke*, 2 Sim., 192; *Fry on Specific Perform.*, 398, 399.

⁴ *Wethered v. Wethered*, 2 Sim., 183; see *Houghton v. Lees*, 1 Jur. N. S., 862.

was decreed of a covenant in the grant of an annuity for the covenantor's life to charge the annuity on whatever he should become entitled to, by will or otherwise, in the event of his wife's decease, although such covenant related to a mere expectancy.¹ And agreements concerning the costs of proceedings in lunacy or the ultimate division of a lunatic's property have been upheld.²

§ 38. *Caution exercised as to agreement in relation to expectancy.*—But contracts concerning expectancies will be scrutinized by the court, and only enforced when the circumstances are such as to render the interference of equity obviously proper. Two young officers in the British army signed and exchanged a writing by which each charged his estate with one thousand pounds in favor of the other in case the other should survive him, the consideration being the mutual promise. A long time afterward they corresponded with a view to rescind the agreement, which, however, was never done. It was held, that considering the nature of the transaction, the age and condition of the parties, and their subsequent correspondence, there was no equitable claim which ought to be enforced. But the court retained the bill a year, with liberty to the plaintiff to bring an action at law.³

§ 39. *Agreement for expectancy terminates at death of party.*—A contract in relation to an expectancy can only be enforced against the party in his life-time, such an agreement being purely personal. In an early case the court said: "The surrenderor not having any title whatever to the premises at the time of the surrender, his agreement would not raise a lien upon the land; and, although the present plaintiffs might have been relieved if they had filed their bill against him in his life-time—that is, after the title had accrued, yet it does not follow that therefore they can be relieved against his heirs. Neither the land itself nor the

¹ Lyde v. Mynn, 1 M. & K., 683.

² Persse v. Persse, 7 Cl. and Fin., 279.

³ Ryan v. Daniel, 1 Y. & C. C. C., 60.

conscience of the present defendants is bound by the act of the surrenderor.”¹ So, it has been held that though such a contract might create a personal liability, yet that there was no such interest as would pass by a bargain and sale to assignees in bankruptcy.²

§ 40. *Provision by parents for children.*—Defective conveyances by parents as a provision for children have often been aided in equity, and the principle is applicable to brothers and sisters. Where a father agreed not to devise his real estate, but permit it to descend to his eldest son and heir at law, upon the express trust that in case the son should succeed as devisee to the property of a third person, he would convey the estate, which should thus descend to him from his father, to his younger brothers; and the son, in pursuance of this agreement, executed a deed to his brothers which was defective; it was decreed that he should make a good and sufficient conveyance to them.³ Where a parent, for the purpose of securing a provision for his two children, executed deeds of part of his estate to them, but retained the deeds in his possession, directing his wife to lodge them with the town clerk, for record, after his death, which was done, there being no claim of a creditor or purchaser, it was held such an agreement as the court would enforce.⁴

§ 41. *Contract to dispose of property by will.*—A person may make a valid agreement binding himself to dispose

¹ *Morse v. Faulkner*, 3 Swanst., 429 note.

² *Careleton v. Leighton*, 3 Mer., 667.

³ *Browne v. Browne*, 1 Har. and Johns., 430.

⁴ *Jones v. Jones*, 6 Conn., 111. As the deeds were retained by the grantor in his own possession, the giving them into the custody of the town clerk for record was not a delivery of them. It would have been different if the deeds had been delivered to the wife before the grantor's death, as in that case the delivery of them to the wife of the grantor, to take effect upon his decease, would, by legal operation, have been a delivery to the grantees themselves. *Belden v. Carter*, 4 Day, 66. But a voluntary conveyance made with a view to a family settlement, if there be no fraud on a third person, is binding in equity. *Clavering v. Clavering*, 2 Vern., 473; *Broughton v. Broughton*, 1 Atk., 625; *Johnson v. Smith*, 1 Ves., 314; *Bunn v. Winthrop*, 1 Johns. Ch., 329; *Soverbye v. Arden*, lb., 140. Accordingly, in *Jones v. Jones*, *supra*, as the transaction was in favor of the children of deceased, and intended as a provision by way of settlement, it was upheld. See *Post*, §§ 285, 286.

of his property in a particular way by last will and testament; and a court of equity will enforce such an agreement by compelling the heir at law to convey the property in accordance with the terms of the contract;¹ but such a contract, especially when it is attempted to be established by parol, is regarded with suspicion, and not sustained excepting upon the strongest evidence that it was founded upon a valuable consideration, and deliberately entered into by the decedent.² While, in some of the cases we have cited below, the courts refused to decree the specific performance of such an agreement, they all recognized the power of individuals to make binding contracts of this nature, and relief was denied on other grounds. In the case of *Lord Walpole v. Lord Orford*,³ there was an agreement to make mutual wills, and although its execution was not decreed because of its uncertainty and vagueness, no doubt was expressed as to the power of courts of equity to enforce such an agreement, nor of their inclination to do so, where it was sufficiently specific, and upon a proper consideration. An heir at law claiming a right to certain land, went to the tenant in possession, who likewise claimed an interest in the fee, and threatening to evict her at law, she promised that if she died without issue, she would leave him either a specified sum of money, or the land. Previous to her death she devised the land to her second husband, who never had any notice of the agreement. A bill

¹ *Logan v. Weinhold*, 7 Bligh, N. S. 1; *Rives v. Rives*, 3 Dessaus Eq., 195; *Izard v. Izard*, Ib., 116, *note*; *McClure v. McClure*, 1 Pa. St., 378; *Brinker v. Brinker*, Ib., 53; *Logan v. McGinnis*, 12 Pa. St., 32; *Mundorff v. Kilbourn*, 4 Md., 459; *Wright v. Tinsley*, 30 Mo., 389; *Gupton v. Gupton*, 47 Ib., 37; *Sutton v. Hayden*, 62 Ib., 101; *Johnson v. Hubbell*, 10 N. J. Eq., 2 Stock, 332; *Frisby v. Parkhurst*, 29 Md., 58; and see *Lord Walpole v. Lord Orford*, 3 Ves., 402; *S. C.* 7, D. and E. 138; *Lewis v. Madocks*, 8 Ves., 150; *Fortescue v. Hennah*, 19 Ib., 71; *Podmore v. Gunning*, 7 Sim., 644; *Moorhouse v. Colvin*, 9 Eng. L. and Eq., 136; *Harder v. Harder*, 2 Sandf. Ch., 17; *Carlisle v. Fleming*, 1 Harring, 421. *Contra*, *Stafford v. Bartholomew*, 2 Carter, 153.

² *Shakspeare v. Markham*, 10 Hun. 311, referring to *Ogilvie v. Ogilvie*, 1 Bradf., 356; *Bowen v. Bowen*, 2 Ib., 336; *Williams v. Hutchinson*, 3 N. Y., 312; *Robinson v. Raynor*, 28 Ib., 494; *Parsell v. Stryker*, 41 Ib., 480; *Lisk v. Sherman*, 25 Barb., 433; *Cox v. Cox*, 26 Gratt., 305; *Sprinkle v. Hayworth*, Ib., 384.

³ *Supra*.

was filed by the heir at law to have the agreement enforced, and it was decreed against the husband.¹

§ 42. *Agreements for separation.*—A court of equity has jurisdiction to enforce the specific performance of an agreement for separation of husband and wife, by the execution of proper deeds for that purpose;² or, if the deed has been executed, to enforce its stipulations;³ and to compel, by in-

¹ Goilmere v. Battison, 1 Vern., 48.

² Wilson v. Wilson, 1 House of Lds., 538; Affg. S. C. 14, Sim. 405; 5 House of Lds., 40; 23 L. J. Ch., 697; Fletcher v. Fletcher, 2 Cox, 99; Thomas v. Brown, 10 Ohio St., 250; Hitner's Appeal, 4 P. F. Smith, 114; Barron v. Barron, 24 Vt., 375; Dutton v. Dutton, 30 Ind., 455. *Contra*, Mansfield v. Mansfield, Wright, 284; Simpson v. Simpson, 4 Dana, 140; McCrocklin v. McCrocklin, 2 B. Mon., 370; McKennan v. Phillips, 6 Whart., 571; Hutton v. Duey, 3 Pa. St., 100; Champlin v. Champlin, 1 Hoffm. Ch., 55; Rogers v. Rogers, 4 Paige Ch., 518; Reed v. Beazley, 1 Blackf., 97. It has been maintained by eminent judges, that deeds of separation between husband and wife, through the intervention of trustees, ought not to be upheld either as to the separation, or as to a stipulation for a separate maintenance. Evans v. Evans, 1 Hagg., Consist. R., 36, per Lord Stowell. "Lord Eldon intimated that a settlement by way of a separate maintenance on a voluntary separation of husband and wife, was against the policy of the law, and void; and he made no distinction between settlements resting on articles, and a final complete settlement by deed; or between the cases where a trustee indemnified the husband against the wife's debts, and where there was no such indemnity. The ground of his opinion was, that such settlements, creating a separate maintenance by voluntary agreement between husband and wife, were in their consequences destructive to the indissoluble nature and sanctity of the marriage contract." 2 Kent's Com., p. 175, referring to St. John v. St. John, 11 Ves., 530, and see the opinion of Lord Eldon, in Westmeath v. Salisbury, 5 Bligh, N. S., 339. But the doctrine is now well settled in England; and it is regarded with more favor than formerly in the United States. The agreement must, however, be for immediate, and not for future, separation, the latter being void. Durant v. Titley, 7 Price, 577; Hindley v. Westmeath, 6 B. and Cresw., 200. But the following clause in a deed was held to be valid and binding: "If my wife and myself should ever part, or be separated, or divorced, I will account to her and her heirs for all such advances as may be made to her by her father; and, in the meantime, they are to be kept to her separate use and control." Waring v. Waring, 10 B. Mon., 331. Articles of separation, to which a trustee was a party, were executed by a husband and wife, the husband covenanting that the wife might live separately, and that he would not disturb her; and it was agreed that the wife's real and personal property should be held in trust for her maintenance, that she would not call upon her husband for assistance, nor contract debts on his account, and that if she did not dispose of her property by will, it might go to her heirs. Held binding on the husband. Heyer v. Burgher, 1 Hoffm. Ch., 1. When the wife returns to her husband for the purpose of resuming her duties and privileges as a married woman, and is received by him as his wife, their previous agreement to separate maintenance falls with the contract out of which it arose, and upon which it was founded. Shelthar v. Gregory, 2 Wend., 422; Pidgin v. Cram, 8 N. H., 350.

³ Vansittart v. Vansittart, 2 De G. and J., 255; Stapilton v. Stapilton, 2 Lead. Cas. in Eq., 853.

junction, the husband to forbear from molesting his wife ;¹ or to restrain him from suing for a restoration of conjugal rights, in violation of a covenant inserted in a deed of separation executed under a decree of the court ;² but not to enforce a simple agreement between them to live separately ; a husband and wife being incapable of contracting without the intervention of some third person.³ Such an agreement must have been founded on a good consideration. The staying of a suit in the ecclesiastical court for nullity of marriage on the ground of impotency of the husband, was deemed a sufficient consideration against him.⁴ The same was held of an agreement by the wife to accept maintenance from the husband, instead of bringing a suit for a divorce *a mensa et thoro* ;⁵ also, of an engagement by the trustees to indemnify the husband against the wife's debts ;⁶ or to do so, provided an annuity, which was to be paid, was secured ;⁷ also of a covenant, by a third person, to pay the husband's debts.⁸ A consideration which is good against the creditors of the husband will, of course, be good against

¹ Sanders v. Rodway, 22 L. J. Ch., 230 ; 16 Beav., 267 ; Flower v. Flower, 20 W. R., 231.

² Hunt v. Hunt, 10 W. R., 215.

³ Hope v. Hope, 26 L. J. Ch., 417 ; Wilkes v. Wilkes, 2 Dick, 791 ; Dibble v. Hutton, 1 Day, 221. The intervention of a trustee for the wife has generally been deemed essential in order to give validity to provisions for her separate maintenance. Legard v. Johnson, 3 Ves., 359 ; St. John v. St. John, 11 Ib., 526 ; Watkins v. Watkins, 7 Yerg., 283 ; Simpson v. Simpson, 4 Dana, 140 ; Tourney v. Sinclair, 3 How. Miss., 324 ; Bettie v. Wilson, 14 Ohio, 257 ; Carson v. Murray, 3 Paige Ch., 483 ; Carter v. Carter, 14 Sm. and Marsh, 59. But the provisions of a deed of separation have been enforced without a trustee. More v. Ellis, Bunb., 205 ; Guth v. Guth, 3 Bro. C. C., 614 ; Frampton v. Frampton, 4 Beav., 294 ; Picket v. Johns, 1 Dev. Eq., 123 ; Hutton v. Duey, 3 Pa. St., 100 ; Barron v. Barron, 24 Vt., 375. "It is unquestionably more convenient and proper, in cases of separation, that trustees should be appointed by whom the provisions for the wife's separate maintenance may be enforced." Hill on Trustees, p. 426.

⁴ Wilson v. Wilson, *supra*.

⁵ Hobbs v. Hull, 1 Cox, 445.

⁶ Stephens v. Olive, 2 Bro. C. C., 90 ; Compton v. Collinson, Ib., 38 ; Worrall v. Jacob, 3 Mer., 256 ; Westmeath v. Westmeath, Jac., 126 ; Elsworthy v. Bird, 2 Sim. and Stu., 381. The absence of such a covenant on the part of the trustees would not invalidate the deed as against the husband, though it would not be binding on his creditors. Fitzer v. Fitzer, 2 Atk., 511.

⁷ Wellesley v. Wellesley, 10 Sim., 256.

⁸ Wilson v. Wilson, *supra* ; Jones v. Waite, 5 Bing. N. C., 341.

him. Adultery by the wife will not prevent the court from enforcing articles of separation ;¹ but otherwise, when there is an agreement before marriage for the payment out of the husband's estate of an annuity to the wife in the event of a separation taking place between them ; as that would furnish an inducement to the wife "to be guilty of the most atrocious conduct in order to entitle herself to the provision."²

§ 43. *Enforcement of compromise.*—A compromise will be enforced the same as any other agreement, and the court will not inquire into the validity of the claim on which it is founded ; the compromise of a claim in good faith, to which a person believes he is liable, and of the nature of which he is aware, being a good consideration for the agreement.³ But the compromise, to be upheld, must relate to a doubtful claim ; for if the claim is undisputed, payment of a part will not discharge the rest for want of consideration.⁴ Where, however, "parties, whose rights are questionable, have equal knowledge of facts, and equal means of ascertaining what their rights really are, and they fairly endeavor to settle their respective claims among them-

¹ Seagrave v. Seagrave, 13 Ves., 439 ; Buchanan v. Buchanan, 1 B. and B., 203 ; Blount v. Winter, 3 P. Wms., 276.

² Cocksedge v. Cocksedge, 14 Sim., 244. But see S. C. 5, Hare 397.

³ Attwood v. — 1 Russ., 353 ; Bailey v. Wilson, 1 Dev. & Batt. Eq., 182 ; Moore v. Fitzwater, 2 Rand., 442 ; McIntire v. Johnson, 4 Bibb., 48 ; Zane v. Zane, 6 Munf., 406 ; Chamberlain v. McClurg, 8 Watts & Serg., 31. "If compromises are otherwise unobjectionable, they will be binding, and the right will not prevail against the agreement of the parties ; for the right must always be on one side or the other, and there would be an end of compromises if they might be overthrown upon any subsequent ascertainment of rights contrary thereto. If, therefore, a compromise of a doubtful right is fairly made between parties, its validity cannot depend upon any future adjudication of that right. There must, however, be an honest disclosure, by each party to the other, of all such material facts known to him relative to the rights and title of either as are calculated to influence the judgment in the adoption of the compromise ; and any advantage taken by either party of the other's known ignorance of such facts, will render the same void in equity, and liable to be set aside." Story's Eq. Juris., Secs. 131, 132.

⁴ Fitch v. Sutton, 5 East., 230 ; Thomas v. Heathorn, 2 B. & Cr., 477 ; Down v. Hatcher, 10 Ad. & El., 121 ; Blanchard v. Noyes, 3 N. H., 518 ; Seymour v. Minturn, 17 Johns., 169 ; Wheeler v. Wheeler, 11 Vt., 60 ; Geiser v. Kershner, 4 Gill & Johns., 305 ; State v. Payson, 37 Me., 361.

selves, every court must feel disposed to support the conclusions or agreements to which they may fairly come at the time, and that, notwithstanding the discovery of some common error;”¹ or notwithstanding the subsequent decision of a court shows that the rights of the parties were different from what they supposed.² Where two persons agreed upon a boundary line between their lands by a compromise in writing, and there was no appearance of unfairness, fraud, or mistake, specific performance was decreed.³ And where a creditor entered into an agreement with a third person, for a valuable consideration, to compromise the claim of the former against his debtor, it was held such an agreement as would be specifically enforced.⁴ The court strongly leans in favor of family arrangements which are in the nature of a compromise,⁵ and which neither mistake nor want of mutuality will prevent from being conclusive between the parties. “Where family arrangements,” said Lord Eldon, “have been fairly entered into, without concealment or imposition upon either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation and mistaken their rights, a court of equity will not disturb the quiet which is the consequence of that agreement.”⁶ A father and son compromised a contention

¹ Lord Langdale in *Pickering v. Pickering*, 2 Beav., 31. And see to the same effect the remarks of Lord Alvanley in *Gibbons v. Gaunt*, 4 Ves., 849.

² *Lawton v. Champion*, 18 Beav., 87. ³ *Fugatt v. Robinson*, 18 B. Mon., 680.

⁴ *Phillips v. Berger*, 8 Barb., 527.

⁵ *Cory v. Cory*, 1 Ves. Sen., 19; *Stockley v. Stockley*, 1 V. & B., 30; *Clifton v. Cockburn*, 3 M. & K., 76.

⁶ *Gordon v. Gordon*, 3 Swanst., 400. “Whenever doubts and disputes have arisen with regard to the rights of different members of the same family, and fair compromises have been entered into to preserve the harmony and affection, or to save the honor of the family, those arrangements have been sustained by courts of equity, albeit perhaps resting on grounds which would not have been satisfactory if the transaction had occurred between mere strangers.” Sugden, Chancellor, in *Stapleton v. Stapleton*, 2 Wharton & Tucker’s Eq. Cas., *note*. See *Bailey v. Wilson*, 1 Dev. & Batt., 182; *Price v. Winston*, 4 Munf., 63; *Watkins v. Watkins*, 24 Ga., 402; *Fulton v. Smith*, 27 Ib., 413; *Smith v. Smith*, 36 Ib., 184; *Pullen v. Ready*, 2 Ark., 587. But the law is jealous of whatever tends to the destruction of family confidence, or to induce the disobedience of parental authority, and it will not uphold an agreement which has that effect. In *Mer-*

as to the title to a farm by an agreement under seal binding the father to pay the son twenty-five hundred dollars—five hundred in thirty days, one thousand out of the first payment made on the sale of the farm, and one thousand out of the second payment. The father paid the first instalment, but failed to pay the others, or to sell the land. Held to create a charge upon the land, and to entitle the son to a decree for specific performance. In such case the court might properly appoint a trustee to make the sale. The unpaid money became due after a reasonable lapse of time for the father to sell the land and realize from its sale.' An agreement in settlement of a family dispute will not be specifically enforced, unless the arrangement is final; nor if it is hard and unconscionable, or unequal, or if a strict legal construction of its terms would give the plaintiff undue advantage.² When an agreement for the compromise of family disputes is not complete in itself, but a mere plan looking to a future adjustment of details, and consequently so far from settling the family difficulties it may be the germ of future litigation, specific performance will of course not be decreed.³ Where a compromise was entered into through the mistake of counsel, a bill for specific performance was dismissed, but without costs.* The compromise of a suit may be enforced by motion or petition in the original suit to stay proceedings, when the prompt interference of the court is necessary to carry the agreement into effect; as where one of the parties is liable to immediate attachment. But if the agreement for a compromise goes beyond the ordinary range of the court in the existing suit, includes a number of details, money to be paid, and acts to be performed, or the equity sought to

cier v. Mercier, 50 Ga., 546, the contract was held incapable of being enforced, for the reason that its declared object was the repudiation of a parent's advice and authority, so that both might be set aside during his life, with a guaranty of impunity to the son for any disobedience or want of filial loyalty on his part.

¹ Johnson v. Johnson, 40 Md., 189.

² Wistar's Appeal, 80 Pa. St., 484.

³ Ibid.

⁴ Swinfen v. Swinfen, 27 L. J. Ch., 35.

be enforced is different from that on the record, or the agreement is denied, or the right to have it enforced in the suit disputed, a fresh suit should be brought for specific performance.¹

§ 44. *Arbitration not compelled*.—An agreement to refer matters to arbitration will not be specifically enforced; nor will the court require arbitrators to make an award.² Where the parties to a contract for the sale of land, stipulated that if they could not agree as to the price, to leave it to two disinterested men to fix the same, and the price was to be paid within a year following, but no price had been fixed some ten years afterward, it was held that a specific performance could not be decreed.³ Specific performance cannot be enforced of an agreement that property shall be sold at a price to be determined by valuers, if no valuation be made; nor the appointment of valuers be decreed, or any other mode of determining the price be substituted by the court,⁴ unless there has been such acquiescence in, or part performance of, the contract, as would render it inequitable not to enforce its execution, in which case the court will deter-

¹ *Pryer v. Tribble*, L. R. 10, Ch. 534; *Forsyth v. Manton*, 5 Mad., 78; *Wood v. Rowe*, 2 Bligh, 595, 617; *Askew v. Millington*, 9 Hare, 65; *Richardson v. Eyton*, 2 De G. M. & G., 79. See *Tibbutt v. Potter*, 4 Hare, 164.

² *Mitford Pl.* 264; *Crawshay v. Collins*, 1 Swanst., 40; *Street v. Rigby*, 6 Ves., 815; *Gourlay v. Duke of Somerset*, 19 Ib., 429; *Agar v. Macklew*, 2 Sim. and Stu., 418; *Gervaise v. Edwards*, 2 Dr. and W., 80; *Conner v. Drake*, 1 Ohio St., 166; *Toby v. County of Bristol*, 3 Story, 800; *Noyes v. Marsh*, 123 Mass., 286. The reason given for this rule is, that courts of equity will not aid parties in ousting by their agreements the jurisdiction of the ordinary tribunals of the country established for the trial of causes. See *Mitchell v. Harris*, 2 Ves., 131. "The regular administration of justice might be greatly impeded or interfered with by such stipulations, if they were specifically enforced. And at all events, courts of justice are presumed to be better capable of administering and enforcing the real rights of the parties, than any mere private arbitrators, as well from their superior knowledge, as their superior means of sifting the controversy to the very bottom." *Story's Eq. Juris.*, Sec. 670. Moreover, the exercise of such a jurisdiction would conflict with the policy of the common law, which permits parties, in all cases, to revoke a submission to arbitration, even though the submission has been made a rule of court. *Gourlay v. Duke of Somerset*, 19 Ves., 431; *Agar v. Macklew*, 2 Sim. and Stu., 418; *Milnes v. Gery*, 14 Ves., 400; *Greason v. Ketletas*, 17 N. Y., 491.

³ *Griffith v. Frederick County Bank*, 6 Gill and J., 424.

⁴ *Blundell v. Brettargh*, 17 Ves., 232; *Vickers v. Vickers*, L. R. 4, Eq. 529; *Firth v. Midland R.R.*, L. R. 20, Eq. 100.

mine what is a fair value.¹ Parties obtained a lease for ten years, with the right to renewal from time to time, for five hundred years, the amount of rent to be ascertained by two assessors, one to be appointed by the lessors, and the other by the lessees. The lessees, on the faith of the covenant to renew, made improvements on the premises of very great value, but at the end of ten years the lessors refused to do anything toward renewal, and brought an action at law for the use and occupation of the property. The lessees thereupon filed a bill in equity to restrain the action until the lessors appointed an assessor, and an order was entered to that effect.² Where an agreement for the sale of land provided that the price should be ascertained by certain persons, and the vendor refused to allow them to go on to the land, it was held that he should be compelled to permit the valuation, and that after it was made, the vendee might file a supplemental bill for specific performance.³ If it be agreed to sell at a fair valuation, without providing any mode of determining the value, the court will adopt means for that purpose.⁴ It is the same, where there is an agreement for a lease upon such usual and proper terms as shall be adjudged by a competent person.⁵ Where an individual was admitted into a firm upon the terms that in case of the dissolution of the partnership by his death or otherwise, his share should be purchased at a valuation to be made by a person on each side, it was held that the court, in order to complete the agreement, could direct another mode of valuation upon failure of the one agreed upon.⁶ Where an agreement for the sale of land provided that personal property thereon should be taken at a valuation by valuers to be appointed, and the vendor refused to complete and to appoint a valuer, specific performance was decreed except as to the personal

¹ *Dunnell v. Ketletas*, 16 Abb. Pr., 205.

² *Tscheider v. Biddle*, 4 Dillon, 55. See *Biddle v. Ramsey*, 52 Mo., 153.

³ *Morse v. Merest*, 6 Mad., 26.

⁴ *Milnes v. Gery*, 14 Ves., 400.

⁵ *Gourlay v. Duke of Somerset*, *supra*. ⁶ *Dinham v. Bradford*, L. R. 5, Ch. 519.

property.¹ An inequitable refusal of a party to refer to arbitration may deprive him of the aid of the court, on the principle that he who seeks equity must do equity. A deed was executed creating a lien for a solicitor's bills and advances, the amount of which was to be settled by arbitration; but the arbitrator died before making an award. A suit having been brought for a re-conveyance of the property, the court held that as the agreement between the parties was composed of two distinct parts—the first, admitting that some balance was due to the solicitor, and the second, a stipulation for a specific mode of ascertaining that balance, the latter of which alone had failed—it would not grant the relief asked unless the plaintiff would consent to do equity by having the accounts taken by the master.²

§ 45. *Enforcement of award.*—The specific performance of an award for the doing of a certain thing—as to convey land, assign securities, renew a lease at a rent fixed by arbitrators, adopt a boundary line, or the like—may be enforced, though not made a rule or order of the court.³ And though the agreement for arbitration names a penalty for failure to comply with the award, and the losing party

¹ Richardson v. Smith, L. R. 5, Ch. 648.

² Cheslyn v. Dalby, 2 Y. and C. Ex., 170. Where a lease made it optional with the lessor, either to take back his property at the end of the term and pay for the improvements, the value of which was to be determined by arbitrators, or to renew the lease, and he refused to do either, it was held that, although there could not be a decree for specific performance, and the usual remedy in such a case was an action for damages, yet that, as the court had acquired jurisdiction of the cause, it would retain the suit for the purpose of awarding compensation for the value of the improvements. Hopkins v. Gilman, 22 Wis., 476.

³ Hall v. Hardy, 3 P. Wms., 187; McNeil v. Magee, 5 Mason, 244; Jones v. Boston Mills Corp., 4 Pick., 365; Cook v. Vick, 2 How. Miss., 882; Story v. Norwich & Worcester R.R. Co., 24 Conn., 94; Viele v. Troy & Boston R.R. Co., 21 Barb., 381; Johnson v. Conger, 14 Abb. Pr., 195; Caldwell v. Dickinson, 13 Gray, 365; Kelso v. Kelly, 1 Daly, 419; Memphis & Charleston R.R. Co. v. Scruggs, 50 Miss., 284. The authority of the arbitrator may be revoked by either of the parties, at any time before the award is made, unless the reference is made under an order of the court; and after such revocation, the arbitrator has no power to make an award. Haggett v. Welsh, 1 Sim., 134. See Skee v. Coxson, 10 B. & C., 483; Milne v. Gratrix, 7 East., 608; Green v. Pole, 6 Bing., 443; Allen v. Watson, 16 Johns., 295; Marsh v. Packer, 20 Vt., 193; Tyson v. Robinson, 3 Ired., 333. But a revocation of the authority of arbitrators, good at law may be bad in equity. Harcourt v. Ramsbottom, 1 J. & W., 505.

offers to pay the penalty.¹ "Because an award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person."² Accordingly, where the owners of contiguous lands could not agree as to their dividing line, and stipulated in writing to leave it to arbitrators, and to stand to and abide by their decision, and an award was made designating the line, which the owner who refused to perform failed to show was erroneous, it was held to be a proper case for a decree of specific performance.³ So, where the complainants filed their bill for specific performance of an award previously made between the parties touching the fairness and equality of a partition of lands; or if the court declined to decree specific performance of the award, asking that it would ascertain whether the partition was fair and equal; and the defendant answered that part of the bill praying for specific performance of the award, and demurred to the remainder; it was held that the demurrer was well taken. If the award was valid, both parties were concluded by it, and the validity of the partition could not be drawn in question.⁴ An award may be specifically enforced

¹ *Whitney v. Stone*, 23 Cal., 275.

² *Wood v. Griffith*, 1 Swanst. 54, per Eldon, L. C.; *Blackett v. Bates*, L. R. 1, Ch. 117; *Bouck v. Wilber*, 4 Johns. Ch., 405; *Penniman v. Rodman*, 13 Metc., 382. It has been held in England, that a railroad company, after notice to treat for land has been given to the land-owner, and the price of land has been fixed by arbitrators under the lands clauses consolidation act, is in the same position with regard to the land-owner as an ordinary purchaser, and will be compelled by a court of equity to complete the purchase. *Harding v. Metropolitan R.R. Co.*, L. R. 7, Ch. 154. It seems that the idea prevailed at one time in England, that a company, by giving notice to treat, committed itself in such a manner that a court of equity would hold that to be an agreement on the part of the company from which it could not recede, and which could be enforced before the transaction had gone any further. It was, however, decided that the giving notice would only authorize the person who received it to insist that the course pointed out by the act should be taken, and that a mandamus would issue compelling the company to summon a jury, or proceed to arbitration for the ascertainment of the price. But the case is different when the price has been determined, for there are then all the elements of a complete agreement, and it becomes a bargain made under legislative enactment between the railroad company and those over whom it is authorized to exercise its power. *Ibid.*, per Hatherley, L. C., referring to *Adams v. Blackwell R.R. Co.*, 2 Mac. & G., 118.

³ *Thompson v. Deans*, 6 Jones' Eq., 22.

⁴ *Emaus v. Emaus*, 14 N. J. Eq., 114.

when the petitioner cannot obtain by a verdict all that it was the object of the award to give him.¹ But not an award merely for the payment of money which can be recovered at law, or by the ordinary proceedings upon the award.²

§ 46. *Grounds for declining to enforce award.*—Suits for the specific performance of awards are not peculiar, but belong to the ordinary jurisdiction of courts of equity as applied to the specific performance of agreements. It rests in the sound discretion of the court to enforce awards, as well as contracts; and equity will not interfere where objections to the enforcing of an award appear upon its face or otherwise.³ As where the acts of arbitrators appointed for the valuation of interests are not valid at law as to time, manner, or other circumstances; or where the arbitrators have been guilty of misconduct;⁴ unless there is acquiescence or part performance.⁵ Specific performance was refused of an agreement to sell at a valuation which, on the construction of the agreement, was to be made during the lives of the parties, one of whom had died previous to the award.⁶ The same was done where the agreement was to sell an estate at such price as a valuer should award, and the award was made partly in consideration of circumstances which rendered it doubtful whether the valuation had been estimated with due attention to accuracy.⁷ So it has been held that the court may inquire into the adequacy of the consideration, notwithstanding it is agreed that the sale shall be made at a valuation to be determined by the arbitrators.⁸ As the arbitrators are chosen by the parties, it is not in general a good objection to an award, that it is un-

¹ Kirksey v. Fike, 27 Ala., 383; Jones v. Blalock, 31 Ib., 180.

² Norton v. Mascall, 2 Vern., 24; Turpin v. Banton, Hardin, Ky., 312; Howe v. Nickerson, 14 Allen, 400; Babier v. Babier, 24 Me., 42. *Contra*, Wood v. Shepherd, 2 Patton & Heath, Va., 442.

³ Backus' Appeal, 58 Pa. St., 186.

⁴ Chichester v. McIntyre, 4 Bligh, N. S., 78.

⁵ Blundell v. Brettargh, 17 Ves., 232, 241.

⁶ Parken v. Whitby, Turner & Russell, 366.

⁷ Norton v. Mascall, *supra*.

⁸ Emery v. Wase, 8 Ves., 505.

reasonable.¹ Thus, an award was enforced notwithstanding it ordered the sale of an estate under circumstances which greatly depreciated its value.² But the court will refuse to enforce an award, on the ground of its unreasonableness, when the decision of the arbitrators destroys the rights of one of the parties to the agreement.³ Where the agreement embodied in the submission is of such a nature that the court would not enforce it, it will not enforce the award founded on it. An award which is excessive, or defective, will not be enforced.⁴ But an award rendered legally void by a mere clerical error, will be specifically decreed, unless its performance would work injustice.⁵ If costs be awarded, which arbitrators have no power to do, specific performance of the residue of the award may still be decreed.⁶ If the amount fixed by an award is to be a lien on the property, the lien attaches upon the making of the award, and furnishes an element of equity jurisdiction.⁷

§ 47. *Valuation determined by court.*—Where the fixing of a value by arbitrators is not of the essence of the contract, the court will carry the agreement into effect, and will itself, if necessary, ascertain the value.⁸ Accordingly, where partners agreed that upon the determination of the partnership one partner should purchase the share of the other at a valuation to be made by two persons, one to be appointed by each partner, and the firm was carried on for some time under that agreement, it was held, affirming the decree of the vice-chancellor, that, although the valuation could not be made in the way proposed, there being no provision in the agreement for the appointment of an umpire, yet that the court would carry the agreement into effect by ascertaining the value of the share.⁹ Where an

¹ *Ives v. Metcalfe*, 1 Atk., 64.

² *Wood v. Griffith*, 1 Swanst., 43.

³ *Nickels v. Hancock*, 7 De G. M. & G., 300.

⁴ *Ibid.*

⁵ *Buyss v. Eberhardt*, 3 Mich., 524.

⁶ *Caldwell v. Dickinson*, 13 Gray, 365.

⁷ *Memphis & Charleston R.R. Co. v. Scruggs*, 50 Miss., 284. See *Overbee v. Thrasher*, 47 Ga., 10.

⁸ *Richardson v. Smith*, L. R. 5, Ch. 648; *Smith v. Peters*, L. R. 20, Eq. 511.

⁹ *Dinham v. Bradford*, L. R. 5, Ch. 519.

agreement was entered into for the sale of a public house and the fixtures, furniture, and other effects at a valuation to be made by a valuer appointed by both parties who undertook the valuation, but the vendor refused to allow him to enter the premises for that purpose, the court made a mandatory order compelling the vendor to allow the entry; the court having power to make any interlocutory order which is reasonably asked as ancillary to the administration of justice at the hearing.¹ So, where a contract for a lease provided that the rent should be fixed by arbitrators, which was not done, for the reason that the landlord refused to give a bond to abide by the award, and the tenant, having taken possession and expended money on the faith of the agreement, filed a bill, it was referred to a master to ascertain what rent should be paid.² In a suit for the specific performance of a covenant to renew a lease, where it was stipulated that the rent for the new term should be a percentage of the value of the premises, and that such value should be determined by arbitrators, and the lessor refused to submit the matter to arbitration, the court, after hearing the evidence, enforced the contract in its essential terms.³

§ 48. *Enforcement of foreign contracts.*—Specific performance may be decreed, notwithstanding the subject of the contract was not originally within the jurisdiction of the court, as the contract itself may give the court jurisdiction. Jurisdiction may be acquired to enforce contracts entered into abroad by the residence of the parties in this country, as was done in the case of a marriage contract made in France, the parties having gone to England.⁴ But a foreign contract, to be capable of being enforced here, must not only be valid by the law of the country in which it was entered into, but consistent with the law and policy

¹ Smith v. Peters, *supra*.

² Gregory v. Mighell, 18 Ves., 328.

³ Strohmaier v. Zeppenfeld, 3 Mo. App. R., 429; see City of St. Louis v. St. Louis Gaslight Co., 5 Ib., 484.

⁴ Foubert v. Turst, 1 Bro. P. C., 129.

of this country.¹ If the contract fall within the fourth section of the statute of frauds, it must satisfy the terms of that section, although in the country where the contract was made it was not required to be in writing; that section having reference to the procedure, and not to the solemnities of the contract.² The relief is not restricted to personal contracts, but extends to those concerning real estate, when the parties reside within the jurisdiction of the court,³ or are temporarily within the jurisdiction, if served

¹ Hope v. Hope, 26 L. J. Ch., 417. Mr. Story summarizes some of the exceptions to the rule, as follows: "A court of equity has not necessarily jurisdiction over a subject of ordinary equity cognizance, simply because the parties are within the forum. Accordingly, it was held that a court of equity sitting in and for one county in the State of Pennsylvania, had no jurisdiction over a bill praying for an injunction against the defendant residing in another county, but who was temporarily within the jurisdiction of the court, for erecting a nuisance which injured the plaintiff's land in that county; for, to give a complete remedy in such cases, a court must not only restrain and prevent the continuance of the nuisance, but must order its removal, and give compensation in damages for the injury already caused; and for a court of equity to give this ample relief, the *locus in quo* must be within the absolute jurisdiction of the court. So, it seems, a court has no jurisdiction to order a defendant to sell lands situate in a foreign jurisdiction, when the case would be otherwise within its power. Nor will a court of equity enforce against defendants, who have in their hands proceeds of the sale of lands situated out of the jurisdiction, the same equities to which such proceeds would have been unquestionably subject had the land sold been within the jurisdiction. The exercise of such a power seems to depend upon the fact whether the contract sought to be enforced was capable of being fulfilled by the *lex loci rei sitæ*. And this, although the parties are within the jurisdiction, and the proceeds of the land come into their hands, *in specie*. And if by the *lex loci rei sitæ*, the land could be alienated only upon the application of the proceeds in a particular manner, such a law is valid, and courts of equity will not interfere with the proceeds, though brought within its jurisdiction."

² Leroux v. Brown, 12 C. B., 801.

³ Arglasse v. Muschamp, 1 Vern., 75; Toller v. Carteret, 2 Ib., 495; Jackson v. Petrie, 10 Ves., 164; Lord Portarlington v. Soulby, 3 M. & K., 108; Massie v. Watts, 6 Cranch, 158; Watkins v. Holman, 16 Pet., 25; Sutphen v. Fowler, 9 Paige Ch., 280; Stansbury v. Fringer, 11 Gill. & Johns., 149; Wood v. Warner, 15 N. J. Eq., 81; Olney v. Eaton, 66 Mo., 563. See Pingree v. Coffin, 2 Gray, 288. "It is the familiar doctrine of a court of equity, that it only acts upon the person of the defendant, and by its process against him, compels the performance of acts necessary to do justice to the plaintiff; and the rule is, that it binds the person and not the estate. The court of chancery does not bind the interest in land, but enforces the party to perform his own agreement. The process of sequestration of the real estate was only to compel the party to do what he was directed to do. This was so clearly the principle of the court, and the mode of its proceeding, that it entertained, and still entertains, questions as to property in other countries out of the jurisdiction of the court, and it interferes to stop proceedings in all courts, and even in the courts of other nations; acting, in all cases, upon the person of the defendant if within the jurisdiction; and enforcing the performance of the decree by personal process, commitment, and sequestration, in case of disobedience." Batten on Specif. Perform., 146.

with process,¹ although the contract was made abroad, and is to be performed there.² A contract to set out a boundary between two estates abroad, according to a line agreed upon, was specifically enforced.³ So the foreclosure of a mortgage of immovable property situated abroad will be decreed against the mortgagor.⁴ Where it is agreed abroad to deliver a thing *in specie* to a person in this country, and the thing itself is brought here, the court here, in the exercise of its discretion, may see to it that the thing does not leave this country so as to defeat the right of the plaintiff to have it so delivered.⁵ So a person may be enjoined from suing abroad in breach of a contract, or a judgment creditor be compelled to convey land situated abroad.⁶ The jurisdiction is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom the order is made being within the power of the court.⁷ The court will not, by its decree, compel a defendant to go into a foreign State and specifically execute a contract there. In a recent case, the prayer of the complainant's bill was that the defendant, a Georgia corporation, might be decreed to specifically perform the contract alleged to have been made with the defendant for the right of way for its railroad

147. Referring to *Wiseman v. Roper*, Vin. Abr. 5, 532; *Foster v. Vassall*, 3 Atk., 589; *Penn v. Lord Baltimore*, 1 Ves. Sen., 444; *Lord Cranstoun v. Johnston*, 3 Ves., 170; *Jackson v. Petrie*, 10 Ib., 104; *Stratton v. Davidson*, 1 R. & M., 485.

¹ *Orr v. Irwin*, 2 Law Repos., N. C., 465; *Cleaveland v. Burrell*, 25 Barb., 532; *Dooley v. Watson*, 1 Gray, 414; *McGregor v. McGregor*, 9 Iowa, 65; *Penn v. Hayward*, 14 Ohio St., 302. But see *Porter v. Worthington*, 14 Ala., 584; *Carter v. Jordan*, 15 Ga., 76; *Smith v. Iverson*, 22 Ib., 190; *Akin v. Lloyd*, 28 Ill., 331; *Birchard v. Cheever*, 40 Vt., 94.

² *Myers v. De Mier*, 4 Daly, 343. See *Davis v. Parker*, 14 Allen, 94. In Wisconsin it has been held that in a suit to enforce specific performance of a contract to convey land, a bill may be filed in any county of the State. Generally suit should be brought where the parties reside or the land lies. *Burrall v. Eames*, 5 Wis., 260.

³ *Penn v. Lord Baltimore*, *supra*.

⁴ *Toller v. Carteret*, *supra*.

⁵ *Hart v. Herwig*, L. R. 8, Ch. 860.

⁶ *Bailey v. Rider*, 10 N. Y., 363; and see *Newton v. Brownson*, 13 Ib., 587.

⁷ *Lord Portarlington v. Soulbey*, *supra*.

through the lands of the complainant situated in South Carolina, and to recover damages for the injury already sustained from the non-performance of that contract. The complainant's equity was based upon his alleged right to have the defendant compelled, by a decree of the court of Georgia, to specifically perform the alleged contract in South Carolina, by keeping the ditches open upon the complainant's land in that State to the depth of five feet, and to construct and keep in repair sufficient cattle-guards or stock-gaps upon the said land. It was held that the suit could not be maintained, and that the court below erred in overruling a demurrer to the bill.¹

§ 49. *Contracts incapable of being enforced.*—Equity will not interfere when the contract is such that it is out of the power of the court to enforce it. A company having been formed for the purpose of supplying water to a district, the plaintiff filed a bill alleging that in consequence of his refusal to pay what he thought an unreasonable sum for the water supplied to him, the company threatened to cut off his supply; that the company was bound to supply water to the inhabitants of the district on payment of a reasonable rate, and was not at liberty to sever from the mains pipes laid with their own consent so long as the owners continued to pay the rate originally agreed upon; that the old rate paid by plaintiff was reasonable, while that demanded was unreasonable; and he prayed that the company might be decreed to continue to him his supply of water upon payment by him of either the rate originally agreed upon, or such other rate as should be reasonable, if they were not bound to accept the old one; for an issue at law; and for an injunction to restrain the company from severing the plaintiff's pipe from the mains, or interrupting his supply of water. It was held that what the plaintiff asked could not be granted, for the reason that it was beyond the

¹ Port Royal R.R. Co. v. Hammond, 58 Ga., 523. See *post*, § 49, reference 5, p. 69.

power of the court.¹ As already stated,² a specific performance will not, in general, be enforced for a violation of a contract for the personal services of an adult; the remedy being an action at law for damages.³ A court of equity cannot enforce the performance of the daily prospective duties, or direct the conduct of a member of a firm in matters requiring his personal skill and judgment in the management of the business of the firm;⁴ nor will specific performance be decreed of covenants in a farming lease.⁵ So, a covenant will not be enforced by means of an injunction, when the acts complained of as breaches are frequent, and the court cannot ascertain whether in each case there has been a breach without an action at law; as of a covenant not to sell water to the plaintiff's injury.⁶ Where a contract for the sale of land provided that the purchase money should be paid on such terms as might be agreed upon between the parties, it was held that the stipulation could not be enforced, the court having no power to compel the parties to agree.⁷ On the same principle, specific performance of a contract to loan money to be secured by a mortgage will not be decreed.⁸ Equity will not enforce the perform-

¹ *Weale v. West Middlesex Water Co.*, 1 J. and W., 363. In this case Lord Eldon said: "Could I, under this act, compel one inhabitant to take water from this company? I apprehend I could not. If the company do not choose to supply water, I cannot compel them; and if the Legislature meant to give me the right to do it—by right I mean a compulsory means to make them give a supply—it ought to have been taken care of in the act. I cannot, upon principle, do it without such a power."

² *Ante*, § 33. But see *post*, § 117.

³ *Haight v. Badgeley*, 15 Barb., 499.

⁴ *Buck v. Smith*, 29 Mich., 166. A contract between a partner and a firm relative to the management of a mill, the marketing of lumber, and the financial affairs of the firm of which he was to have charge, cannot be specifically enforced at the suit of the representatives of the deceased partner; the court having no means of seeing to its execution, or of supplying the judgment or business faculty of the deceased partner. *Roberts v. Kelsey*, 38 Mich., 602.

⁵ *Rayner v. Stone*, 2 Ed., 128. The making of a secret medicine will not be restrained. An injunction, in such a case, would be of no use, unless a disclosure of the secret were made to enable the court to ascertain whether or not it was infringed; otherwise the court would have no means of enforcing its own orders. *Newberry v. James*, 2 Mer., 446.

⁶ *Collins v. Plumb*, 16 Ves., 454. See *City of London v. Nash*, 3 Atk., 512; *Caswell v. Gibbs*, 33 Mich., 331.

⁷ *Huff v. Shepard*, 58 Mo., 242.

⁸ *Rogers v. Challis*, 27 Beav., 175; *Sichel v. Mosenthal*, 30 Ib., 371.

ance of continuous duties involving personal labor and care of a particular kind which the court cannot superintend, as : the working of points and signals on the line of a railroad requiring constant supervision ;¹ or a contract to build and equip a railroad ;² or to work all the trains on a railroad, and keep the engines and rolling stock in repair ;³ or to use the railroad of another company with engines and trains, which the court cannot regulate and control ;⁴ or an agreement by a railroad company to maintain and keep in repair cattle-guards upon the land of the plaintiff ;⁵ or a covenant in the lease of a coal mine to work the mine efficiently ;⁶ or an agreement by a street railroad company to run cars along a particular street daily, "at such regular intervals as may be right and proper," whether the obligation of the company rests in contract, or is derived from the provisions of its charter.' The owners of land granted to a company the lease of a coal mine, reserving a minimum rent of seven hundred and twenty pounds to be increased to a thousand pounds in case there should be pits sunk upon the estate, with a royalty upon all coal obtained beyond a certain quantity ; and the lessees covenanted to work the mine uninterruptedly, efficiently, and regularly, according to the usual and most approved practice. The lessees paid the minimum rent, but only mined a small quantity of coal by working through an adjoining mine, without sinking pits on the lessors' property. The plaintiffs being desirous of enforcing a large amount of work, whereby an increased rent would be payable, filed a bill for specific performance. It was held that the lessees

¹ Powell Duffryn Steam Coal Co. v. Taff Vale R.R. Co., L. R. 9, Ch. 331.

² Danforth v. Phila., etc., R.R. Co., 30 N. J. Eq., 12.

³ Johnson v. Shrewsbury and B. R.R., 3 De G. M. and G., 914.

⁴ Powell Duffryn Steam Coal Co. v. Taff Vale R.R. Co., *supra*.

⁵ Columbus, etc., R.R. Co. v. Watson, 26 Ind., 50.

⁶ Wheatley v. Westminster Coal Co., L. R. 9, Eq. 538 ; Lord Abinger v. Askton, 17 Ib., 358.

⁷ McCann v. South, etc., R.R. Co., 2 Tenn. Ch., 773. Mandamus or proceedings in the name of the State is the remedy for enforcing a duty imposed on a corporation by its charter.

were under no obligation to sink pits, although that might be the most effectual mode of working; that if the lessees had committed any breach of contract, the remedy was not in equity, but at law; and that the court could not, by a reference to chambers, give effect to the covenant by directions as to the management of a coal mine.¹ S. granted to a railroad company a right of way through his premises on condition that the company would place beside its road on said premises a platform convenient for loading and unloading cars, take therefrom all produce shipped by S., and bring and place thereon all freight shipped by or for him to that point from any other station on the road, provided the company had three days' notice. Held that S. could not compel specific performance.² Within the foregoing

¹ *Wheatly v. Westminster Coal Co.*, *supra*.

² *Atlanta, etc., R.R. Co. v. Speer*, 32 Ga., 550. In this case the court said: "We are not asked to compel the plaintiffs in error to transport a particular article of freight now being on the platform awaiting transportation—we are asked that they shall, in all future time, transport all freight and deliver it as required by defendant in error in the terms of the contract. It is evident that any such decree must be as general and as indefinite in its terms as the contract itself. It cannot be specific as to the kind of produce, the quality, the time of performance; nor can the court make a decree which will be satisfied by any specific act of performance. After decree made, the case must be kept open, and if the defendant in that decree be contumacious, there must be action of the court to enforce it twenty, perhaps fifty, times a year for all time. Besides, in regard to each alleged violation of the contract, the other party is entitled to a hearing. He may insist that the freight in question at one time is not of the description contemplated in the contract; at another, that it is not the property of the party complaining; at still another, that notice had not been given in the terms of the contract. We are satisfied that this is not a contract of which performance can be compelled by one sweeping decree embracing all time and all instances demanding performance. The party has an adequate remedy at law, and doubtless would be redressed there." The following clause in a deed to a railroad company is incapable of being specifically enforced: "This conveyance is made upon the express condition that said railroad company shall build, erect, and maintain a depôt or station-house on the land herein described, suitable for the convenience of the public, and that at least one train each way shall stop at such depôt or station each day when trains run on said road, and that freight and passengers shall be regularly taken at such depôt." *Blanchard v. Detroit, etc., R.R. Co.*, 31 Mich., 43. *Graves*, Ch J.: "Can the court see that in all coming time these requirements are carried out? Can it know or keep informed whether trains are running, and what accommodations are suitable to the public interest? Can it see whether the proper stoppages are made each day? Can it take notice or legitimately and truly ascertain from day to day what amounts to regularity in the receipt and discharge of passengers and freight? Can it have the means of deciding at all times whether the due regularity is observed? Can it superintend and supervise the business, and cause the requirements in question to be carried out? If it can, and if it may do this in regard to one sta-

rule, an agreement to cultivate a particular crop, and to cut, cure, and deliver it in a prescribed manner, is not such a contract as the court has jurisdiction to enforce or to

tion on the road, it may, with equal propriety, upon a like showing, do the same in regard to all stations on the road, and not only so, but in regard to all stations on all the present and future roads in the State. That any such jurisdiction is impracticable appears plain, and the fault lies in the circumstance that the objects of the parties, as they were written down by them, are, by their very nature, insusceptible of execution by the court." In a suit for specific performance by a land-owner against a railroad company, it appeared that the company, in consideration of the right of way for their track over the plaintiff's land, agreed to fence the same, to deliver to the plaintiff certain bonds, and to release him from a subscription to the stock of the company. It was held that the facts alleged entitled the plaintiff to a judgment for damages, but not to specific performance. *Cincinnati & Chicago R.R. Co. v. Washburn*, 25 Ind., 259. A court of equity, as a temporary measure during the pendency of a litigation, may undertake by means of a receiver to operate a railroad. *Coe v. Columbus, etc., R.R. Co.*, 10 Ohio St., 372. But it will only do this when the demand for the exercise of such a jurisdiction is imperative, and the court can make an order of limited duration, and give precise directions as to the manner in which the order shall be carried out. *Port Clinton R.R. Co. v. Cleveland & Toledo R.R. Co.*, 13 Ib., 544; see *Richmond v. Dubuque & Sioux City R.R. Co.*, 33 Iowa, 422. A demurrer was sustained to a bill filed for the specific performance of an award which required that the defendant should execute to the plaintiff a lease of the right to such part of a railway made by the plaintiff as was on the defendant's land, and that the defendant should be entitled to run carriages on the whole line on certain terms, and might require the plaintiff to supply engine-power, while the latter should have an engine on the road; and that the plaintiff, during the whole time, should keep the entire railroad in good repair. The court remarked that it "had no means of enforcing the performance of daily duties during the term of the lease; that it could do nothing more than punish the party by imprisonment or fine in case of failure to perform them, and might be called on for a number of years to issue repeated attachments for default." *Blackett v. Bates*, L. R. 1, Ch. 117, per Lord Cranworth. Specific performance was refused of a contract concerning the use and enjoyment of a quarry providing for "the delivery of certain kinds of marble in good sound blocks of a suitable size, shape, and proportion, and to quarry to order, as might be wanted to keep the mill fully supplied at all times, the amount to be not less than 75,000 feet per annum, and for so long a time as the said Ripley, his heirs, executors, administrators, and assigns, might want." The court said: "The agreement being for a perpetual supply of marble, no decree the court can make will end the controversy. If performance be decreed, the case must remain in court forever, and the court, to the end of time, may be called on to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was sound, whether it was of suitable size, or shape, or proportion. Meanwhile, the parties may be constantly changing. It is manifest that the court cannot superintend the execution of such a decree. It is quite impracticable. And it is certain that equity will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder." *Marble Co. v. Ripley*, 10 Wall., 339. In a suit to compel the defendant to convey to the plaintiff certain land, it appeared that the defendant and another person owned the land, and that, being desirous of having it partitioned, the defendant employed the plaintiff to do the business, agreeing that, for plaintiff's services, he would convey to him three hundred and twenty acres of defendant's share of the land. A bond was given to secure the performance of this agreement, giving to the plaintiff the right of

estimate the damages for its breach.¹ But if the work agreed to be done is definite, and there is no remedy at law, specific performance will be decreed; as, the construction by a railroad company of an archway under their road pursuant to their contract.² So, specific performance was decreed of a contract between the owner of land and a railway company, that, in consideration of the previous withdrawal by the land-owner of a petition to Parliament against the company's bill, the company would construct and forever maintain at their expense a siding of a specified length along the line upon the premises of the land-owner and set apart by him for that purpose.³ The contract of a railroad company to construct bridges, works, and approaches on land of the plaintiff crossed by its line was specifically enforced where a substituted agreement afterward made had become incapable of fulfilment in consequence of the death of the person agreed upon to fix the damages.⁴

selection, and making it incumbent on the defendant to convey as soon as the selection was made. A partition having been partly effected, further proceedings therein were postponed until the boundaries of the land could be fixed by the proper authorities. This was not done until three years afterward, when the plaintiff proposed to complete the partition; but the defendant refused to allow him to do so; whereupon he made a selection, and demanded a conveyance. It was held that, as the plaintiff could not be compelled to complete the services he had agreed to perform, nor the defendant to accept them, the contract was not one which could be specifically enforced. *Cooper v. Pena*, 21 Cal., 403. Although usually a contract, relating to personal services, will not be specifically enforced, but the party aggrieved will be left to his remedy at law, yet there is an exception to the rule, when, by the contract, something is to be done, on a party's own land, of such a nature that the opposite party will be deprived of the benefit of labor and materials bestowed thereon, unless the contract is carried out, and the owner of the land is attempting thus to deprive him. Within this principle, a contract between a water-power company and a city, that the former should construct certain extensive water-works, of a capacity to supply the city daily with a specified quantity of water, the works having been constructed, was enforced against the city. *Columbia Water-Power Co. v. Columbia*, 5 S. C., 225.

¹ *Starens v. Newsome*, 1 Tenn. Ch., 239. See *ante*, § 34.

² *Storer v. Gt. Western R.R. Co.*, 2 Y. and C. C. C., 48.

³ *Greene v. West Cheshire R.R. Co.*, L. R. 13, Eq. 44.

⁴ *Firth v. Midland R.R. Co.*, L. R. 20, Eq. 492.

BOOK II.

JURISDICTION, HOW EXERCISED.

CHAPTER I.

WHO MAY SUE OR BE SUED.

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§ 50. *By whom in general suit should be brought.*—

Either party to an executory contract for the sale of land,

may, as has been seen, resort to a court of equity to enforce specific performance.¹ Those who entered into the contract, or who stand in their place or are interested in the subject matter, are, as a rule, the only proper parties to the suit;² and a partial assignment of the complainant's interest before the commencement of the suit to a person who does not join in the bill, is no defence.³ In England, subject to some exceptions, a stranger to the contract cannot sue on it either at law or in equity, notwithstanding he may take a benefit under it;⁴ and the same thing has sometimes been held here. A. covenanted with B.'s mother to convey a tract of land to B. on his coming of age, in consideration that the mother would relinquish to A. the care and control of B. until that time. It was held that the son could not maintain a suit for specific performance.⁵ So where a per-

¹ *Ante*, § 15. *McKee v. Beall*, 3 Litt. Ky., 190; *McWhorter v. McMahan*, 1 Clarke, N. Y., 400. Where a party sells land which has been decreed to him, but for which no conveyance has been made, the purchaser may compel a conveyance to himself by an original bill. *Respass v. McClanahan*, 2 A. K. Marsh, 577.

² *Ante*, § 14. *Humphreys v. Hollis, Jac.*, 73; *Wood v. White*, 4 M. and Cr., 460. See *Boone v. Chiles*, 10 Pet., 177; *Buchanan v. Upshaw*, 1 How., 56; *Tobey v. County of Bristol*, 3 Story, 800; *Bissell v. Farmer's, etc.*, Bank, 5 McLean, 495; *Fagan v. Barnes*, 14 Fla., 53. "Generally, to a bill for a specific performance of a contract of sale, the parties to the contract are the only proper parties; and when the ground of the jurisdiction of courts of equity in suits of that kind is considered, it could not properly be otherwise. . . . It is obvious that persons, strangers to the contract, and therefore neither entitled to the rights nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it, as they are to a proceeding to recover damages for the breach of it." Lord Cottenham, in *Tasker v. Small*, 3 My. and Cr., 63. Parties for whose benefit a contract was not made, and who were neither parties nor privies to it, are not entitled to a specific performance. *Beardsley Scythe Co. v. Foster*, 36 N. Y., 561; *Bacot v. Wetmore*, 17 N. J. Eq., 230. A creditor at large, who has not obtained judgment, and who has no claim upon the property of his debtor, has no right to call for the specific execution or rescission of the debtor's contracts for his own benefit. *Griffith v. Frederick County Bank*, 6 Gill and Johns., 424. The rule is, that the remedy in equity shall either be between the parties who stipulated what is to be done, or those who stand in their place. *Burgess v. Wheate*, 1 W. Bl., 129. See *post*, §§ 58 (*note* 3), 81, 84-86.

³ *Willard v. Tayloe*, 8 Wall, 557.

⁴ *Peele ex parte*, 6 Ves., 602; *Crow v. Rogers*, 1 Str., 592; *Berkley v. Hardy*, 5 B. and C., 355; *Lord Southampton v. Brown*, 6 Ib., 718; *Colyear v. Countess of Mulgrave*, 2 Ke., 98; *Hill v. Gomme*, 5 M. and Cr., 250, 256.

⁵ *Denbo v. Upton*, 2 Ind., 20. One of two joint purchasers of land may maintain a suit against the other in whose name the purchase was made, to compel a conveyance of the plaintiff's share. *Levy v. Brush*, 8 Abb. Pr. N. S., 418.

son who, in consequence of protracted litigation for the recovery of property, had become indebted to his solicitor to a large amount, agreed with his brother to relinquish his interest in the property to his brother in consideration that the latter would undertake to pay the costs already incurred, with interest, it was held that, as the solicitor was not a party to the agreement, he could not enforce it.¹ The following case, which at first seems to be at variance with the principle under consideration, is not so in reality: A. and B. were tenants in common of certain real estate; and A., who had been tenant of B.'s moiety, and in arrear to him for rent, contracted with B. to execute to the plaintiff such lease of the whole premises as B. and the plaintiff should agree upon, and that all the rent should be paid to B. until the arrears due to him were satisfied. B. agreed with the plaintiff for a lease of the property at thirty pounds per annum, and executed a lease of his half, at fifteen pounds per annum. But A. refused to do the same with respect to his moiety. On a bill for specific performance filed by the plaintiff against A. and B., it was urged that as the plaintiff was a stranger, the suit could not be maintained. The objection was, however, overruled, on the ground that B. might be regarded as the agent of the plaintiff in the contract.²

§ 51. *Exceptions to rule as to party complainant.*—Exceptions to the above-mentioned rule, arise: 1st. Where a person is beneficially entitled under a marriage settlement to which he was not a party. 2d. In the case of near relationship between the contracting party and the stranger. 3d. Where a part performance of the contract, by changing the status of the stranger, has entitled him to insist upon its completion.

§ 52. *Who may sue to enforce marriage contract.*—1st. Not only the parties to marriage articles, but those for whose benefit they are entered into, and especially the issue

¹ Moss v. Bainbrigge, 18 Beav., 478, 482; S. C. on Appeal, 6 De G. M. and G., 292.

² Hook v. Kinnear, 3 Swanst., 417, note; per Lord Hardwicke.

of the marriage, are regarded as purchasers, and in that capacity entitled to the specific performance of the contract. It is well settled, that "in marriage contracts the children of the marriage are not only objects of, but *quasi* parties to it."¹ Collaterals were formerly excluded. But the same principle is now established with regard to them; it being impossible for the court to know what collateral branches may have been in the minds of the contracting parties at the time of the contract. Furthermore, as the trustees might bring an action at law for the non-performance of the covenant to settle, and the measure of damages in such action would be the interests of all their *cestuis que trust*, the collaterals would thus enjoy the benefit of the covenant; and the relief in equity must be at least commensurate with the damages at law.² The principle under consideration is also applicable to appointees of the wife under a power inserted in the articles; such appointees, in respect to the husband, claiming under, and standing in the place of, a purchaser.³ Mr. Fry⁴ remarks that no case shows that a collateral ever enforced the articles against the covenantor solely on the ground of relationship, but that "in each case the party who had exacted the stipulation was dead without having in any way released it, and the claimants have sought to stand in the place of the party who, for a valuable consideration as regards the original settlement, had exacted the stipulation sought to be enforced. It does not therefore follow that the original parties to the settlement could not release it as against collaterals, or that collaterals could enforce it against such parties, supposing them, or those of them through whom the collaterals claimed, to be alive and resisting performance."⁵

¹ Lord Cottenham, in *Hill v. Gomme*, 5 M. and Cr., 254; Fry on Specif. Perform., 42, 43. See *Gray v. McCune*, 23 Pa. St., 447.

² *Goring v. Nash*, 3 Atk., 186; *Davenport v. Bishop*, 1 Phil., 698; *Edwards v. Countess of Warwick*, 2 P. Wms., 171; *Osgood v. Strobe*, *ib.*, 245; *Vernon v. Vernon*, *ib.*, 594; *Affid. 1 Bro.*, P. C., 267; *Stephens v. Trueman*, 1 Ves. Sen., 73; *Pulvertoft v. Pulvertoft*, 18 Ves., 84, 92.

³ *Campbell v. Ingilby*, 21 Beav., 567; *Affid.*, 26 L. J. Ch., 654.

⁴ Specif. Perform., 44, 45.

⁵ *Hill v. Gomme*, *supra*.

§ 53. *Near relative entitled to sue.*—2d. When one of the parties to a contract is nearly related to the person to be benefited by it, the latter may maintain a suit thereon. Accordingly, where a man promised his physician that if the latter would effect a certain cure he would pay a given sum to the physician's daughter, it was held that she might sue.¹ So, in an action brought by a husband and wife, the plaintiffs alleged that the wife's father, being seized of an estate, which afterward descended to the defendant, was about to cut down one thousand pounds worth of timber, to raise a portion for his daughter, when the defendant promised the father that, if he would not fell the timber, he would pay the daughter one thousand pounds. The plaintiffs having obtained a verdict, it was moved in arrest of judgment, that the father alone could have brought the suit. But the objection was overruled, on the ground of nearness of relationship."²

..... § 54. 3d. *Suit by stranger whose condition has been changed.*—Another exception to the general rule, that a stranger deriving a benefit from a contract, cannot sue on it, arises where the contract has been so far performed as to change the condition in life of the stranger, and to raise in him reasonable expectations grounded on the conduct of the contractor. Where, for instance, a gentleman of wealth enters into an agreement with a poor man, that the former will take the child of the latter, bring him up in affluence, and leave him certain property, and there is a part performance, the child is entitled to have the agreement carried out; his right being derived not from the contract itself, but from what has been done under it, and the wrong he will

¹ Physician's case, *cited*, 1 Ventr., 6.

² Dutton v. Pool, 11 Ventr., 318, 332; Martyn v. Hind, Cowp., 443. Relationship more remote than that of parent, child, or wife, carries with it no moral obligation upon which a court of equity will found a decree for the specific performance of a mere executory contract. Buford v. McKee, 1 Dana, 107; Hayes v. Kershaw, 1 Sandf. Ch., 258; Reed v. Vannorsdale, 2 Leigh., 569; Caldwell v. Williams, Bailey Ch., 175. See Chandler v. Neale, 2 Hen. and Munf., 124; Parker v. Carter, 4 Munf., 273; Hawey v. Alexander, 1 Rand, 219.

otherwise sustain.' In New Jersey an infant child went to live with his uncle, under an agreement between the father of the child and the uncle, that the latter should adopt the child as his own. The child lived with his uncle twenty-five years, and had no share of his father's estate, by reason of the expectations founded on this agreement; and it was held that the child might maintain a suit to enforce a fulfilment of the agreement on the part of the uncle.¹

§ 55. *Persons having an interest in subject of contract.*—All persons interested in an estate which has been made the subject of a contract for sale, are proper parties to a suit for specific performance; and if minor children have been improperly made parties, the rest of the bill will not be impaired thereby.² Where specific performance is sought of an agreement for the sale of land, persons who were not parties to it, but who have been vested with certain rights subsequent to the making of the contract, are proper parties in a suit to adjudicate the rights of the parties thereto.³ Pending a suit to enforce specific performance, the respondent conveyed the premises to a third party, and a decree was rendered for such performance, without bringing in the third party. Held, that the decree should be reversed on appeal.⁴ And it has been held that if A. having entered into a contract for purchase with B., afterward contract with

¹ Hill v. Gomme, *supra*; Lyons v. Blenkin, Jac., 245; Fry on Specif. Perform., 46.

² Van Dyne v. Vreeland, 11 N. J. Eq.; 3 Stockt., 370. See Coles v. Pilkington, L. R. 19, Eq. 174.

³ Williams v. Leach, 28 Pa. St., 89; Seager v. Burns, 4 Minn., 141. Specific performance of a contract to convey land will not be enforced in favor of a part only of those interested, but all must join in the suit. Slaughter v. Nash, 1 Litt. Ky., 322; Rochester v. Anderson, 6 Ib., 143; Spier v. Robinson, 9 How. Pr., 325; McCotter v. Lawrence, 6 Thomp. and Cook, 392; 4 Hun., 107; Lavender v. Thomas, 18 Ga., 668; Craig v. Smith, 94 Ill., 469; Fleming v. Holt, 12 W. Va., 143. The omission of indispensable parties to a bill, is error compelling a reversal in the appellate court, though the objection was not raised in the court below. Watson v. Oates, 58 Ala., 647. An infant may maintain a bill for specific performance where a party contracting in the infant's behalf was competent, and the contract was made on full consideration which has been paid. Guard v. Bradley, 7 Ind., 60.

⁴ Curran v. Holyoke Water-Power Co., 116 Mass., 90.

⁵ Casady v. Scallen, 15 Iowa, 93.

C., that B. shall convey to C., of which B. has notice, A. cannot enforce the contract against B. without making C. a party.¹ So, where a third person acquired an interest in the subject matter of the suit previous to the contract, he may be regarded as in some sense a party, and may be joined. A contract for the purchase of certain land was entered into by A. with B., A. having previously agreed to sell the land to C. A. and C. joined in a suit for specific performance against B.; and it was held that they were both proper parties.²

§ 56. *Adverse claimants to interest of vendor or vendee.*—Persons who have adverse or inconsistent rights in the subject matter of the suit, cannot be made parties plaintiff;³ nor can a person who claims adversely to the vendor, as a rule be made a party defendant in a suit by the purchaser;⁴ though it seems he may be made a defendant to the vendor's bill.⁵ But in a suit for the specific performance of a contract for sale, it was held that one who claimed title to the land under the vendor could come in and assert his right, as a decree might cast a cloud upon his title.⁶ Where a purchaser of real estate at a sheriff's sale sued to enforce a conveyance from the sheriff, and the former owner also claimed a right to redeem, it was held that he ought to be joined as a party defendant.⁷ Where at an auction sale it

¹ *Anon v. Walford*, 4 Russ., 372. If A. covenant with B. to convey to him a tract of land, and B. subsequently requests A. to convey the land to C., and A. does so, it is a satisfaction of the covenant; and if the purchase money, or any part of it, be still due and unpaid from B. to A., A. may have his action against B. to recover it. *Webster v. Tibbits*, 19 Wis., 438.

² *Nelthorpe v. Holgate*, 1 Coll. C. C., 203.

³ *Fulham v. McCarthy*, 1 House of Lds., 703; *Padwick v. Platt*, 11 Beav., 503; *Grant v. Schoonhoven*, 9 Paige Ch., 225.

⁴ *Tasker v. Small*, 3 M. and Cr., 63; *Dehogton v. Money*, L. R. 2, Ch. 164.

⁵ See *Calvert on Parties*, 329; *Evans v. Jackson*, 8 Sim., 217; *Sanders v. Richards*, 2 Coll., 568. Where the interests of the vendee, his wife, and his assignee in trust for creditors, are conflicting, the vendor, in his bill for specific performance, may ask to have the respective rights of the claimants determined. *Hanchett v. McQueen*, 32 Mich., 22.

⁶ *Carter v. Mills*, 30 Miss., 432.

⁷ *Crosby v. Davis*, 9 Iowa, 98. In a suit for the specific performance of a contract to convey an undivided interest in land, those who are subject to the complainant's equity, and hold adversely to him, are necessary parties. *Agard v. Valencia*, 39 Ala., 292.

was arranged that a portion of lot A should be sold as part of lot B, it was held in a suit by the purchaser of lot A for specific performance according to the particulars, that the purchaser of lot B was a necessary party.¹

§ 57. *Adverse claimants to rights of both parties to contract.*—Strangers to the contract who claim adversely to both of the parties to it, may sometimes be made defendants to a bill for specific performance. Thus, where the assignee of an insolvent sold a reversionary interest in stock of the insolvent, and the purchaser was served with notice not to pay the purchase money to the assignee, by a person claiming under a previous assignment made by the insolvent subsequent to his insolvency, a bill brought by the purchaser against the assignee and the adverse claimant, praying an inquiry into the right of the latter, was sustained.² And so in a suit for specific performance by the purchaser from a voluntary settler, the trustees of the settlement, and the persons beneficially interested under it, may be made defendants.³ Where, however, B. agreed to purchase property of A., who sold it under a power of sale contained in a mortgage to A. by C., as trustee and executor of the will of D., and, after acceptance of the title, and preparation of the conveyance, B. received notice from unpaid residuary legatees of D., of a claim by them to the property contracted to be sold, in a suit by A. for specific performance of the agreement, a motion by B. that the residuary legatees might be added as defendants, was denied with costs.⁴

§ 58. *Stranger to contract not a necessary party.*—No liability attaches to a stranger to the contract in respect to its specific performance, though he be a necessary party to the conveyance; as a judgment creditor, mortgagee, or

¹ Mason v. Franklin, 1 Y. and C. C. C., 239. See Peacock v. Penson, 11 Beav., 355.

² Collett v. Hever, 1 Coll. C. C., 227.

³ Willets v. Busby, 5 Beav., 193.

⁴ Harry v. Davey, L. R. 2, Ch. D., 721.

person interested in the equity of redemption.¹ Or a person who has joined the vendor in the sale in respect to other property under conditions as to laying out roads, etc., affecting the whole estate.² Or, as a general rule, one who claims an adverse interest which was vested in him previous to the contract.³ S. was in possession of land. M. claimed a right to preempt it, and, in order to buy him off, S. agreed to pay him sixteen hundred dollars. To secure such payment, the land was entered in the name of H. as trustee, S. advancing the money for the entry, with the understanding that H. was to convey when said amount was paid. On a bill by S. to compel H. to convey the legal title, it was held that M. was not a necessary party, as the transaction was more a mortgage than a bargain and sale, and that a tender of the money in court was sufficient.⁴ Where, during the pendency of a suit for the specific performance of a contract to convey property, creditors of the vendor recovered judgment against him, and sold the property in question, it was held that neither such creditors nor the purchasers were necessary parties.⁵ It seems, however, that judgment creditors, though not necessary, may be proper parties.⁶ In England, a steward who received the rents,

¹ Tasker v. Small, *supra*, overruling S. C., 6 Sim. 625, 636; Sober v. Kemp, 6 Hare, 155; Petre v. Duncombe, 7 Ib., 24; Long v. Bowling, 33 Beav., 585; *ante*, § 56. Some of the exceptions to this rule will be noticed hereafter. The plaintiff in an action for the specific performance of a contract to convey land cannot bring in prior mortgagees of this and other land for the purpose of adjusting his equities with respect to the order of sale upon a future foreclosure, or to secure the application of the purchase money to be paid by him for the satisfaction of the mortgages. Chapman v. West, 17 N. Y., 125. But prior mortgagees of real estate upon which securities are alleged to have been promised to secure a loan of money, are necessary parties in an action to compel specific execution of such securities. The fact that a decree is asked which will operate only on the interest of the party promising the security, is not a sufficient answer to the objection that the mortgagees are not made parties to such bill. Caldwell v. Taggart, 4 Pet., 190. A court of equity may enforce an equitable mortgage against others than the contracting party. And it may specifically execute a contract for a mortgage, or other equitable lien against creditors. Alexander v. Ghiselin, 5 Gill, 138.

² Peacock v. Penson, *supra*.

³ Delabere v. Norwood, 3 Swanst., 144.

⁴ Smith v. Sheldon, 65 Ill., 219; Affg. 44 Ib., 68.

⁵ Secombe v. Steele, 20 How., 94.

⁶ Lord Leigh v. Lord Ashburton, 11 Beav., 470; Seager v. Burns, 4 Minn., 141.

and had the title deeds in his possession, was held improperly joined.¹ And the same was held as to the wife of the owner of the estate who had possession of the deeds.² So, in a suit for the specific performance of a contract made by a mortgagee under a power of sale, the mortgagor need not be made a party.³ A. entered into a contract with a railroad company for the sale to the latter of an estate, and agreed to buy out the tenant. The company having taken possession before the payment of the purchase money, they were served with notices not to trespass on the land, both by A. and his tenant. A. then brought a suit for specific performance, and to restrain the trespass, to which the defendants demurred because the tenant had not been made a party. The objection was held well taken by the vice-chancellor, who thought as the tenant was affected by the injury, he ought to be before the court. But the demurrer was overruled by the lord chancellor on the ground, that as the object of the suit was specific performance, and the company had not paid the purchase money, they might be restrained from entering, whether the entry did or did not affect the tenant.⁴ But when the suit is for the recovery of the possession, as well as for specific performance, a person in possession may be made a defendant, although he was not a party to the contract.⁵ And where a stranger to the contract claims an interest in the purchase money, he may be made a party to the suit.⁶

¹ *Macnamara v. Williams*, 6 Ves., 143. ² *Muston v. Bradshaw*, 10 Jur., 402.

³ *Corder v. Morgan*, 18 Ves., 344; *Clay v. Sharpe*, *ib.* 346, *n.*; *Ford v. Heely*, 3 Jur. N. S., 116.

⁴ *Robertson v. Gt. Western R.R. Co.*, 10 Sim., 314; S. C., 1 Rail. Cas., 459.

⁵ *Bishop of Winchester v. Midhants R.R. Co.*, L. R. 5, Eq. 17.

⁶ *West Midland R.R. Co. v. Nixon*, 1 H. & M., 176. It has been held in Mississippi, that the assignee of a note for the purchase money may maintain a bill against the vendor and vendee and their respective representatives, to enforce the lien, and for a specific performance of the contract of sale, and that it is no objection to the bill that a deed was not tendered; for the title not being in the complainant, he can only reap the benefit of his equity by demanding that the parties to the contract of sale shall be held to the performance of their respective covenants. *Moon v. Wilkerson*, 47 Miss., 633; *Kimbrough v. Curtis*, 50 *ib.*, 117; *Boyce v. Francis*, 56 *ib.*, 573.

§ 59. *Sub-purchaser not to be made a party.*—A purchaser from the vendee is not, as a rule, a proper party to a bill filed by the vendor;¹ nor the original purchaser, when his vendee has been accepted in his place by the vendor.² Where a suit was brought by the vendor against both the purchaser and sub-purchaser, it was dismissed by the vice-chancellor as against the latter, though specific performance was decreed against the original contractor; and the case was affirmed on appeal.³ Where a vendor in a bill against the purchaser for the specific performance, or rescission of the contract of sale, made a sub-purchaser a defendant, and the latter subsequently filed a bill against the purchaser for specific performance of his agreement, and made the original vendor a defendant, a demurrer by the original vendor to the sub-purchaser's bill was overruled, on the ground that the sub-purchaser had been made a defendant to the vendor's bill, and treated as having an interest in the original contract.⁴

§ 60. *Vendees of distinct property.*—As a rule, purchasers of different parcels of land cannot be made co-defendants.⁵ Each separate contract of a vendor with a purchaser, may be the subject of a several suit; and if a number of such purchasers are joined in a single suit, a demurrer will lie for multifariousness.⁶ Where, however, there were several sales of a like kind, and the several pur-

¹ *Anon v. Walford*, 4 Russ., 372; *Corbus v. Teed*, 69 Ill., 205; *post*, § 68. But a third person to whom the vendee had conveyed, and who promised to pay the original vendor, was held a proper defendant. *Campbell v. Patterson*, 58 Ind., 66.

² *Holden v. Hayn*, 1 Mer., 47; *Hall v. Laver*, 3 Y. & C., Ex. 191. See *Hemingway v. Fernandes*, 13 Sim., 228; *post*, § 69.

³ *Cutts v. Thody*, 1 Coll. C. C., 223; approved and followed in *Chadwick v. Maden*, 9 Hare, 188.

⁴ *Fenwick v. Bulman*, L. R. 9, Eq. 165.

⁵ *Brookes v. Lord Whitworth*, 1 Mad., 86; *Rayner v. Julian*, 2 Dick., 677.

⁶ *Ibid.* Separate purchasers of distinct parcels of a tract of land cannot unite in a bill to compel specific performance by the former owner of a contract for the sale of the land to a third person, on the ground that the prior contract has been assigned to one of the complainants for the benefit of all, when there is nothing in the bill beyond the averment to show that the purchase or transfer of such contract was for the benefit of all. *Wood v. Perry*, 1 Barb., 114.

chasers were made plaintiffs in a single suit, and no objection was raised for multifariousness, specific performance was decreed.¹ In a contract for the sale, in separate lots, of leaseholds held under an entire rent, it was stipulated that the purchaser of each lot should unite in the conveyance of the other lot for the purpose of executing covenants of indemnity, and it was held that the purchaser of lot number two need not be a party to a suit by the vendor for the specific performance of the purchase of lot number one.² But where an administrator collusively sold separate lots to different purchasers, a bill making all of them defendants was sustained.³ The rule is sometimes departed from to avoid unnecessary litigation. A suit was brought by a purchaser against trustees for sale, for the specific performance of a contract for the sale of a certain lot. The defence set up was, that by an arrangement to which the plaintiff was a party, a portion of the lot as originally described was taken from it and given to the adjoining lot. The bill was amended to put in issue this averment, but without making the purchaser of the adjoining lot a defendant. It was held that he ought to have been made a party, as otherwise the vendors would be exposed to another suit by him.⁴

§ 61. *Making some of several parties.*—In a proper case, some, of several, may file a bill for specific performance, in behalf of all; as the directors of a joint stock company to enforce an agreement for a lease, without joining all the shareholders.⁵ But the application of the principle that

¹ Hargreaves v. Wright, 10 Hare, Appx., 56. "The general rule is, that unconnected parties may join in bringing a bill in equity, where there is one connected interest among them all centering in the point in issue in the cause." Shafter, J., in Owen v. Frink, 24 Cal., 171. Where A. enters into a contract with B. to sell him a tract of land, and B. assigns to two or more persons his equitable title to distinct portions of the tract, such persons may unite in a suit against A. for a specific performance of the contract. Ibid.

² Patterson v. Long, 5 Beav., 186.

³ Forniquet v. Forstall, 34 Miss., 87.

⁴ Mason v. Franklin, 1 Y. & C. C. C., 239.

⁵ Taylor v. Salmon, 4 M. & Cr., 134. See Van Vechten v. Terry, 2 Johns. Ch., 197; Denton v. Jackson, Ib., 320; Vandeville v. Riggs, 2 Pet., 482; Beatty v. Kurtz, Ib., 566; Dana v. Brown, 1 J. J. Marsh, 304; Robinson v. Smith, 3 Paige Ch., 322. An election was pending in a county for the location of the county buildings, and there was rivalry between different localities of the county

some may be sued in behalf of all, is seldom required in suits for specific performance; and it cannot easily be applied. A joint stock company established by an act of Parliament which authorized them to bring actions in the name of their treasurer, purchased an estate with notice of a previous contract of the owner to grant a lease of part. A bill having been filed by the proposed lessee for the specific performance of the contract, against the treasurer and directors, without making the other proprietors defendants, the court said that though it could bind the interests of parties not before it, it could not compel them to do an act, and that the execution of the lease by a few in behalf of all, would hardly be sufficient, supposing it proper. But though specific performance could not be decreed, the court enjoined the treasurer from disturbing the plaintiff's possession.¹

§ 62. *Where vendor is deceased.*—In general, in case of the death of a party to the contract, the obligation to perform, and the right to insist on performance, devolve on the representatives of the deceased. When the vendor of land dies before completion, the contract may be enforced either by the purchaser,² or by the personal representatives of the vendor, who are the ones not only to receive, but to settle or contest, as the case may be, the amount to be paid by the vendee to whom their discharge or receipt is a necessary muniment.³ In either case, the heirs or devisees must

as to the place which ought to be selected. R. being desirous that the town of T. should be chosen, gave his bond to the Board of Police of the county, donating ten acres of land in T. to the use of the county, provided that place should be designated. T. having been chosen for the county seat, R. refused to convey the land. It was held, in a suit brought by the Board of Police of the county, that they were entitled to a decree for specific performance against R. *Reese v. Board of Police of Lee County*, 49 Miss., 639.

¹ *Meux v. Maltby*, 2 Swanst., 277.

² *Hinton v. Hinton*, 1 Ves. Sen., 631; *Barker v. Hill*, 2 Rep. in Ch., 218.

³ *Baden v. Countess of Pembroke*, 2 Vern., 212; *Potter v. Ellice*, 48 N. Y., 321; *McCarty v. Myers*, 5 Hun., 83. Where one of the executors having left the jurisdiction was superseded by order of the surrogate, and the other executors sold the real estate, it was held that such superseded executor was not a necessary party to a bill for specific performance against the purchaser, although it might be necessary for him to unite with the complainants in a deed to the defendant. *Champlin v. Parish*, 3 Edw. Ch., 581.

be made parties;¹ the object of doing so, being to divest them of the legal title which immediately vests in them upon the death of the ancestor, and which they are bound to convey to the vendee.² Infant, or adult heirs, may be compelled to fulfil a contract made by their testator or intestate to convey land, to the extent of the estate they derive from him, although they are not named in the contract.³ If there are devisees, or if the executors have power to sell, the heir need not be made a party, unless there is reasonable ground to deny the validity of the will.⁴ On the other hand, when the purchase money has been paid in full, the contract of a decedent to convey real estate may be enforced against the heirs alone, although the executor or administrator may also be made a party.⁵ An executor as such, who is also a devisee, is not a necessary party in a suit against the devisees to compel performance of a contract by their testator for the conveyance of

¹ *Roberts v. Marchant*, 1 Hare, 547; S. C., 1 Phil., 370; *Lacon v. Mertins*, 3 Atk., 1; *Galton v. Emuss*, 1 Coll. C. C., 243; *Rutherford v. Green*, 2 Ired. Ch., 121; *Jacobs v. Locke*, Ib., 286; *Craig v. Johnson*, 3 J. J. Marsh, 572; *Glaze v. Drayton*, 1 Dessaus Eq., 109; *Morgan v. Morgan*, 2 Wheat., 290; *Buck v. Buck*, 11 Paige Ch., 170; *Robinson v. McDonald*, 11 Texas, 385; *Burger v. Potter*, 32 Ill., 66; *Moore v. Murrah*, 40 Ala., 573; *Newton v. Swazey*, 8 N. H., 9; 9 Ib., 385. *Contra*, *Shannon v. Taylor*, 16 Texas, 412.

² *Mitchell v. Shell*, 49 Miss., 118. In a suit by the executors of the vendor to foreclose a lien for the purchase money, the heir or devisee must be made a party so as to be bound by the judgment, otherwise the purchaser under the judgment might not get a good title. *Thomson v. Smith*, 63 N. Y., 301. When the vendor has died without making a conveyance, and his administrator brings a suit to enforce the vendor's lien for the unpaid purchase money, the heirs of the vendor must be made parties, and they cannot be dispensed with by tendering, either in the pleadings or at the trial, a deed from such heirs to the vendee, unless the vendee accepts such deed. *Leeper v. Lyon*, 68 Mo., 216.

³ *Hill v. Ressegieu*, 17 Barb., 162. In New York, it is provided by statute, that the "supreme court or a county court shall have power to decree and compel a specific performance by any infant heir or other person, of any contract or agreement made by any party who may die before the performance thereof, on the petition of the executors or administrators of the estate of the deceased, or of a person or persons interested in such bargain, contract, or agreement," etc. *Rev. Sts. of N. Y.*, 6th Ed., p. 200, Sec. 113.

⁴ *Colton v. Wilson*, 3 P. Wms., 192; *Boyse v. Rossborough*, Kay, 71; *Bellamy v. Liversidge*, Sug., 464; *Spier v. Robinson*, 9 How. Pr., 325; *Morrison v. Arnold*, 19 Ves., 673. See *West Hickory Mining Assoc. v. Reed*, 80 Pa. St., 38.

⁵ *Judd v. Mosely*, 30 Iowa, 423. In Iowa, while the statute makes the executor or administrator a proper party to a suit to enforce specific performance of a contract of a deceased vendor, it does not make him a necessary party. *Rev. Sts. of Iowa*, Secs. 2460, 2461.

land.¹ If the personal property has been vested in trustees, by order of court, and the suit is brought by them, the personal representatives are still necessary parties.² In a bill to enforce specific execution of an assignment by one of the distributees of an estate of all his interest in the undivided assets in the hands of the administrator, all of the distributees are necessary parties.³ When the plaintiffs have no power to execute such a conveyance as will pass the vendor's interest, the person who can do it must also be made a party.⁴ If the widow of the vendor but for the contract would have been entitled, she must be made a party.⁵ When the estate has been devised in strict settlement, the trustees, those in whom the first estate of inheritance is vested, and the owner of the intermediate, contingent, or executory interest, are necessary parties.⁶ All the co-heirs of a vendor deceased should join in a bill for the specific performance of a contract for the mutual sale of land; and the death of one of the parties should be proved to excuse his omission as a party to the bill.⁷ But heirs who have conveyed their interests in land contracted by their ancestor, need not be joined in a suit to compel specific performance by heirs who have not conveyed.⁸ So, heirs who have consented that the contract may be enforced, and who have voluntarily vested the title in the administratrix, need not be made parties.⁹ When the executors of a deceased vendor decline to enforce the performance of a contract made by him in his lifetime, the suit may be brought by the creditors of his estate against the executors, heirs, and purchaser.¹⁰

¹ *Watson v. Mohan*, 20 Ind., 223.

² *Cave v. Cork*, 2 Y. & C. C. C., 130.

³ *Bogan v. Camp*, 30 Ala., 276.

⁴ *Roberts v. Marchant*, *supra*; *Fowler v. Lightburn*, 11 Ir. Ch., 495; *Morgan v. Morgan*, *supra*; *Story's Eq. Pl.*, Secs. 160, 177.

⁵ *Hinton v. Hinton*, *supra*; *Brown v. Raindle*, 3 Ves., 256.

⁶ *Hopkins v. Hopkins*, 1 Atk., 590; *Gore v. Stackpool*, 1 Dow, 18, 31; 1 Danl. Ch. Pr., 4th Am. Ed., 226, 265.

⁷ *Morgan v. Morgan*, 2 Wheat., 290.

⁸ *Barnard v. Macy*, 11 Ind., 536.

⁹ *Schoepfel v. Hopper*, 40 Barb., 425.

¹⁰ 1 Mad. Ch., 169. See *Johnson v. Legard, T. & R.*, 290.

§ 63. *Where vendee has died.*—In case of the death of the purchaser before completion, performance of the contract may be enforced either by or against the vendor or by the heirs or devisees of the purchaser; the heirs or devisees being the persons entitled to have the land conveyed to them, and to insist on a proper inquiry into the title.¹ D. contracted with W. for the sale of land. W. assigned to S., who afterward died. Held that in a suit to compel specific performance, the complaint should be filed by the heirs of S., and not by his administrator.² The heirs of an intestate are the proper parties to bring an equitable action to obtain from the defendants a deed of land of which they are alleged to have fraudulently obtained the legal title, contrary to the condition of a bond to their intestate.³ But the heir or devisee of the purchaser is not entitled to specific performance unless the contract is such as might have been enforced against the testator. The propriety of this principle is obvious; for otherwise, the personal estate would be taken to purchase for the heir or devisee what the testator was not bound to purchase, and perhaps would not have purchased.⁴ Of course the contract will not be enforced in favor of the heirs after the personal representatives have rescinded the contract and recovered back the money paid by the deceased vendee in his lifetime.⁵ If the land has not been paid for, the executors or administrators of the vendee are necessary parties; the purchase money being primarily payable out of the personal property.⁶ When the purchaser dies during the pen-

¹ Townsend v. Champernowne, 9 Price, 130; Lord v. Underdunk, 1 Sandf. Ch., 46; Miller v. Henderson, 10 N. J. Eq., 320. In a suit for the specific performance of a contract for the conveyance of land alleged to have been purchased by partners for the purposes of the firm, the heirs of a deceased partner must be made parties. Knott v. Stephens, 3 Oregon, 269.

² House v. Dexter, 9 Mich., 246.

³ Webster v. Tibbitts, 19 Wisc., 438.

⁴ Broome v. Monck, 10 Ves., 597; Savage v. Carroll, 1 B. & B., 265, 281; Collier v. Jenkins, You., 295.

⁵ Pennock v. Freeman, 1 Watts, 401.

⁶ Cocke v. Evans, 9 Yerg., 287; Peters v. Jones, 35 Iowa, 512; 1 Danl., Ch. Pr., 4th Am. Ed., 285; Story's Eq. Pl., Sec. 177. See Holt v. Holt, 2 Vern., 322; Buckmaster v. Harrop, 7 Ves., 341, S. C. 13, 1b. 456; Harding v. Handy,

dency of a suit by the vendor against him, the court, on the application of the real and personal representatives, may order the plaintiff to revive, or in default thereof, that his bill shall be dismissed.¹ When both of the parties to the contract are deceased, and a suit for specific performance is brought by the administrator of the vendor, the administrator and heirs of the vendee, and all who derive title under them, or are interested in the contract, are necessary parties.²

§ 64. *Purchaser with notice of previous contract.*—An alienee of the vendor, and persons claiming an interest in the property obtained from the vendor after the date of the contract with notice of the vendee's rights, are necessary defendants at the suit of the purchaser.³ One who is rightfully in possession of a corporeal hereditament, is entitled to presume knowledge of such possession on the part of any person negotiating for an interest in the property inconsistent with the title by which the possession is held. A person who knows of such possession will not be permitted to deny that he has notice of the title under which the possession is enjoyed; and, for the purpose of notice,

11 Wheat., 104. The administrator of a deceased vendee is a necessary party in a suit by the heirs of the vendee to compel specific performance of a parol contract against a subsequent purchaser with notice, where the personal estate of the deceased is small, the estate still unsettled, and the debts of the deceased vendee not all paid. The administrator has an equitable interest in the real estate on behalf of the creditors greater than that of the heirs. The fact that the heirs are also *bona fide* creditors of the vendee, cannot aid the defect in the bill for want of parties. *Downing v. Risley*, 15 N. J. Eq., 93.

¹ *Norton v. White*, 2 De G. M. & G., 678.

² *Anshutz's Appeal*, 34 Pa. St., 375. Where the purchaser has died, and no administrator of his estate has been appointed, the vendor may maintain a suit for specific performance against the heirs of the purchaser. *Jackson v. McCoy*, 56 Miss., 78.

³ *Echcliff v. Baldwin*, 16 Ves., 267; *Hersey v. Giblett*, 18 Beav., 174; *Case v. James*, 29 Ib., 512; *Bishop of Winchester v. Midhants R.R. Co.*, L. R. 5, Eq. 17; *Barnes v. Wood*, 8 Ib., 424; *Potter v. Saunders*, 6 Hare, 1; *Champion v. Brown*, 6 Johns. Ch., 398; *Langdon v. Woolfolk*, 2 B. Mon., 105; *Castle v. Wilkinson*, L. R. 5, Ch. 536; *Caldwell v. Carrington*, 9 Pet., 86; *Hoagland v. Latourett*, 1 Green Ch., 254; *Glover v. Fisher*, 11 Ill., 666; *Wright v. Dame*, 22 Pick., 55; *Clark v. Flint*, Ib., 231; *Baldwin v. Lowe*, 22 Iowa, 367; *Snowman v. Harford*, 57 Me., 397; *Walker v. Cox*, 25 Ind., 257; *Patten v. Moore*, 32 N. H., 382; *Fullerton v. McCurdy*, 4 Lansing, 132; *Stone v. Buckner*, 12 Sm. & Marsh, 73; *Morris v. Hoyt*, 11 Mich., 9. See *Davis v. Henry*, 4 W. Va., 571; *Powell v. Young*, 45 Md., 414; *post*, § 75.

the possession need not be unceasingly and actively asserted. Where individuals, having a contract for the purchase of mines, took possession, a subsequent vendee of the land was held to have bought with notice of the contract and to be bound by it, notwithstanding it was shown that mining operations had been suspended previous to the date of the purchase.¹ The principle of notice is applicable to all contracts binding the land in equity, as well as to contracts for sale.²

§ 65. *In case of sale of trust estate.*—When a contract is made by a trustee in behalf of another person, and a suit for specific performance of the agreement is brought by the latter, the trustee is a necessary party; as otherwise, another suit might have to be brought against him.³ Where trustees brought a suit to compel the specific performance of the sale of the trust estate, it was held that an objection by the purchaser that another trustee who had been removed, and who did not join in the sale, was not a party, was not well taken; but that the purchaser might insist upon the execution of a deed by such trustee.⁴ A *cestui que trust* is not a proper party to a bill filed by the trustee to enforce specific performance of a contract to convey land; and it is no defence to the bill that the money paid on the contract was a trust fund.⁵ If the estate is held by trustees to sell and pay over the proceeds to persons named, with power to give receipts, the *cestui que trust* need not be made a party to the suit.⁶ But although *cestuis que trust* are not, as a rule, necessary parties to suits by or against trustees, yet it is otherwise, where the trustees are of themselves unable to make a valid contract, or where the *cestuis que trust* are entitled to be heard against the right of the

¹ *Holmes v. Powell*, 8 De G. M. & G., 572.

² *Furnival v. Crew*, 3 Atk., 87.

³ *Cope v. Parry*, 2 J. and W., 538; *Cooke v. Cooke*, 2 Vern., 36; *White v. Watkins*, 23 Mo., 423.

⁴ *Champlin v. Parish*, 3 Edw. Ch., 581.

⁵ *Gibbs v. Blackwell*, 37 Ill., 191.

⁶ *Wakeman v. Duchess of Rutland*, 3 Ves., 233; *Beales v. Lord Rokeby*, 2 Mad., 227; *Potts v. Thames Haven Co.*, 15 Jur., 1004.

trustees to exercise the power under which the contract was made.¹ If a bill be filed by the *cestui que trust* for the specific performance of a contract made by a third person with the trustee for the purchase of real estate, he may make the trustee, purchaser, and grantor, in the deed of trust, defendants; or the trustee may be made a party plaintiff.² Where the legal title of corporation lands is held by a trustee, in an action to enforce specific performance of a contract with such corporation in relation thereto, the trustee should be made a co-defendant.³ If a person conveys property in trust, for a certain purpose, he retains such an interest therein as to entitle him to insist on a specific execution of the trust.⁴ In a suit for specific performance by the purchaser of land at a trustee's sale, the grantor in the deed of trust, who is entitled to the surplus after the payment of the debt secured by the trust, is a necessary party.⁵ When one conveys the real estate in mere execution of a trust, it is unnecessary to make his representatives parties to the suit.⁶ Where a trustee was vested with the legal title for the mere purpose of securing the payment of a sum due to a third person, it was held, in a suit by the equitable owner to redeem and for a conveyance of the legal title to him, that such third person was not a necessary party.⁷

§ 66. *Husband and wife*.—Where the husband has entered into a contract concerning the real estate of his wife, both should be made parties to a suit for specific perform-

¹ *Evans v. Jackson*, 8 Sim., 217; *Saunders v. Richards*, 1 Coll. C. C., 568. Where a husband, at his wife's request, entered into a written contract for the sale of land held by him in trust for her, it was held that it was not error to decree that he convey the land free from her claim for dower, although she opposed the decree. Her right was a mere equity, and it was unnecessary for her to join. *Rostetter v. Grant*, 18 Ohio St., 126.

² *Fleming v. Holt*, 12 W. Va., 143.

³ *Morrow v. Lawrence*, 7 Wis., 574.

⁴ *Chapman v. Wilbur*, 4 Oregon, 362. But where a trustee diverts the property from the purpose for which it was granted, it will not thereby be forfeited or revert to the donor.

⁵ *White v. Watkins*, *supra*.

⁶ *Downing v. Risley*, 15 N. J. Eq., 93.

⁷ *Smith v. Sheldon*, 65 Ill., 219.

ance.¹ On the other hand, it has been held that a suit to enforce an agreement to convey real estate to a married woman in which the husband is not named, may be brought by the wife alone.² Where a husband and wife filed a bill for the specific performance of a contract to convey certain land to the wife, and pending the suit the wife died, it was held that as her children were not joined, or an order made to proceed in the name of the survivors, a decree could not be rendered on the merits.³ The wife, who is a tenant for years, may, with her husband, maintain a suit for specific performance against the lessor.⁴ A wife cannot be compelled to join in a conveyance of land when she was not a party to the contract for its sale; and she is not a proper party in a suit by the purchaser for specific performance.⁵ Where a husband contracted for the sale of his wife's land, describing it as his, it was held that the wife, after his death, could not enforce specific performance by the purchaser for her own benefit.⁶ In a suit to compel specific performance of a contract for the sale of real estate held as stock of a partnership, the wife of a surviving partner need not be made a party; as she has no vested interest in the land.⁷ A suit may be brought to charge the separate estate of a married woman under her contract for purchase;⁸ but not

¹ *Wheeler v. Newton*, 2 Eq. Cas. Abr., 44; *Calvert on Parties*, 269. Where a husband and wife contracted in writing to sell land of the wife, and the separate acknowledgment of the wife was taken, it was held that a bill would lie for specific performance. *Dankel v. Hunter*, 61 Pa. St., 382. *Contra*, *Frarey v. Wheeler*, 4 Oregon, 190. In a bill to compel a conveyance, where the complainants have derived their title in part through a married woman, whose conveyance is void, she should be made a party defendant. *Stansberry v. Pope*, 4 Bibb. Ky., 492.

² *Stampoffski v. Hooper*, 75 Ill., 241. See *Harper v. Whitehead*, 33 Ga., 138.

³ *Hand v. Jacobus*, 19 N. J. Eq., 70.

⁴ *Bain v. Bickett*, 1 Cinc., 161.

⁵ *Richmond v. Robinson*, 12 Mich., 193. ⁶ *Hoover v. Calhoun*, 16 Gratt., 109.

⁷ *Galbraith v. Gedge*, 16 B. Mon., 631.

⁸ *Hulme v. Tenant*, 1 Bro. C. C., 16; *Aylett v. Ashton*, 1 M. and Cr., 105; *Knowles v. McCamly*, 10 Paige Ch., 342; *Hinckley v. Smith*, 51 N. Y., 21. See *Berry v. Cox*, 8 Gill, 466; *Ballin v. Dillaye*, 37 N. Y., 35. In New York "any married woman possessed of real estate as her separate property, may bargain, sell, and convey such property, and enter into any contract in reference to the same, with like effect in all respects as if she were unmarried, and she may, in like manner, enter into any such covenant or covenants for title as are usual in

against her personally.¹ Her engagement, however, must have been made with reference to, and upon the faith and credit of, her separate estate.² Where a married woman, who had property of her own, and lived apart from her husband, agreed to take a lease, it was held that she was bound by the contract to the extent of her separate property, and might be compelled to pay the rent.³ A contract founded upon proper consideration, by which the husband and wife bind themselves to execute a mortgage of the separate estate of the wife, will be enforced by a court of equity, and such estate held liable for the debt intended to be secured.⁴ When a married woman, having a power of appointment,

conveyances of real estate, which covenants shall be obligatory to bind her separate property in case the same, or any of them, be broken.” R. S. of N. Y., 6th Ed., Vol. III., p. 160, § 82.

¹ Francis v. Wigzel, 1 Mad., 258.

² Johnson v. Gummins, 16 N. J. Eq., 97; Harrison v. Stewart, 18 Ib., 451; Hinckley v. Smith, *supra*. In New York a married woman may purchase property upon credit, and bind herself by an executory contract to pay the consideration, and her bond, note, or other engagement given to secure the purchase price of property acquired and held for her separate use, may be enforced against her in the same manner and to the same extent as if she were a feme sole, and her liability does not depend upon the existence of special circumstances, but is governed by the ordinary rules which determine the liability of persons *sui juris* upon their contracts. Cashman v. Henry, 75 N. Y., 103, reversing S. C., 44 N. Y. Supr. Ct., 93. In Iowa “the wife is clothed by statute with the same property rights, and charged with the same liability, as the husband. Indeed, it cannot be said that as to her property she is deprived of any rights which the husband enjoys that relate to his, or that any remedy is denied her or liability removed from her which are possessed by, or imposed upon, the husband. She can control her own property, vindicate her individual rights, and bind herself by contract as fully and to the same extent as her husband.” Spafford v. Warren, 47 Iowa, 47. In South Carolina the provisions of the General Statutes, p. 482, that the husband shall not be liable for the debts contracted by the wife, except for her necessary support, places the husband in the position of a formal, and not a substantial party, to suits against the wife on her individual contracts other than for her necessary support. Ross v. Linder, 12 S. C., 592. For many purposes, equity treats husband and wife as distinct persons, capable of contracting with each other; and their contracts will sometimes be enforced, even as against the creditors of the husband. Campbell v. Galbreath, 12 Bush. Ky., 459.

³ Gaston v. Frankum, 2 De G. and S., 561.

⁴ Hall v. Hume, 37 Md., 500; Stead v. Nelson, 2 Beav., 245. When a married woman buys real estate, and gives her promissory notes for the purchase money, secured by a mortgage on the property purchased, the vendor can hold it in equity for the purchase money. Such a lien can be enforced by a suit to subject the property to the debt, although no personal judgment can be given upon the notes. Pemberton v. Johnson, 46 Mo., 342; Glass v. Warwick, 40 Pa. St., 140. And see Brame v. McGee, 46 Ala., 170; Phillips v. Graves, 20 Ohio St., 371.

or an estate settled to her separate use, with no restraint on anticipation, makes such an agreement as would bind her if she were a *feme sole*, the estate is bound.¹ The omission of mere formalities in the exercise of a power—as where a married woman, who has power to appoint by deed, enters into a contract not under seal—may be supplied, and specific performance be decreed;² but not if the formalities are of the substance of the power, or are intended for her protection.³ Specific performance of the contract of a married woman, entered into even with the concurrence of her husband, for the sale of her real estate not settled to her separate use, or appointment, other than her chattels real, cannot be decreed against her.⁴ Although the contract of a married woman to convey her real property entered into during coverture, be incapable of specific enforcement, yet if she has received money from the vendee on the contract, or has consented that the vendee may take possession of the premises, and he makes permanent improvements thereon, the money so advanced, and the value of such improvements, less the value of the use of the premises, will be decreed to be a charge upon the land, until paid.⁵ Where the separate real estate of a married woman is exchanged for other land, under a contract that the conveyance shall be made to her, and the deed is taken in the name of her husband without her consent, she has an equity to have the contract or trust enforced against the heirs of her husband.⁶

§ 67. *In case of substituted contract.*—When a new con-

¹ Grigby v. Cox, 1 Ves. Sen., 518; Daniel v. Adams, Amb., 495; Martin v. Mitchell, 2 Jac. and W., 425; Nantes v. Corrock, 9 Ves., 189; Heather v. O'Neil, 2 De G. and J., 417; Francis v. Wigzell, 1 Mad., 258. In Massachusetts, under the statute, Genl. Sts., Ch. 108, § 3, providing that "a married woman may bargain, sell, or convey her separate real or personal property, and enter into contracts in reference to the same," she may, with the written assent of her husband, contract for the sale of her real estate, and specific performance may be enforced. Baker v. Hathaway, 5 Allen, 103; Townsly v. Chapin, 12 Ib., 479.

² Dowell v. Dew, 1 Y. and C. C. C., 345. ³ Phillips v. Edwards, 33 Beav., 440.

⁴ Aylett v. Ashton, 1 M. and Cr., 105. See Nicholl v. Jones, L. R. 3, Eq. 696; Avery v. Griffin, 6 Ib., 606.

⁵ Frarey v. Wheeler, 4 Oregon, 190.

⁶ Davis v. Davis, 43 Ind., 561; Dayton v. Fisher, 34 Ib., 336.

tract is substituted for the original one, by the introduction of a new person, as the original contractor is no longer a party to the contract, he ceases to be a proper party to a suit, which must be prosecuted between the parties to the new contract. If, for instance, A. contracts to sell to B., and, before completion, B. contracts to sell to C., and A. deals with C. as the purchaser, this may constitute a new contract; and even where it does not strictly amount to that, B. may be an unnecessary party to the suit.¹ A railroad company having entered into a contract with a land-owner, during the proceedings before Parliament, agreed with a rival company to refer the two bills to certain persons, and that the successful company should assume all the engagements of the other. The company which had contracted with the land-owner withdrew its bill pursuant to the award, and it was held that the land-owner could enforce the contract against the other company that had adopted it.²

§ 68. *Right of assignee to maintain suits.*—When an agreement has been assigned, the vendor cannot compel the assignee to perform, there being no contract between them. Payments made by the assignee will make no difference in this respect. In such case the vendor must enforce the contract against the original vendee.³ But the assignee may maintain a suit for specific performance against the vendor, making the assignor a party,⁴ it being a rule, that where the

¹ Holden v. Hayn, 1 Mer., 47; Hall v. Laver, 3 Y. and C. Ex., 191; Shaw v. Fisher, 5 De G. M. and G., 596.

² Stanley v. Chester and Birkenhead R.R. Co., 9 Sim., 264; 3 M. and K., 773.

³ Corbus v. Teed, 69 Ill., 205; ante, § 59. The above section of course assumes that the contract is capable of assignment, which will not be the case, if it concerns the learning, skill, solvency, or other personal qualification of one of the parties, or is against public policy. Post, §§ 72-74.

⁴ Hanna v. Wilson, 3 Gratt., 293. "Where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent and validity of the assignment are not doubted or denied, and there is no remaining liability to be affected by the decree, it is not necessary to make the latter a party. At most, he is merely a nominal or formal party in such a case." Story's Eq. Pl., Sec. 153. See Brace v. Harrington, 2 Atk., 235; Trecothick v. Austin, 4 Mason, 41; Whitney v. McKinney, 7 Johns. Ch., 144; Miller v. Bear, 3 Paige Ch., 467; Colerick v. Hooper, 3 Ind., 316; Miller v. Whittier, 32 Me.,

original parties to a contract would be entitled to a decree for specific performance, all persons claiming under them have the same rights, provided there are no intervening equities ;¹ as where the original purchaser was given a subsequent parol extension of time for making payment.² The assignee of a lease with a covenant to renew was accordingly held entitled to sue the covenantor for renewal.³ And where the assignee of an agreement for a lease was solvent, and it did not appear that the contract was restricted to the assignor, specific performance was decreed in favor of the assignee.⁴ A. and B. entered into an agreement, by which A. was to furnish twenty-seven hundred peach trees, B. to

203 ; *Currier v. Howard*, 14 Gray, 511. The assignee of one of two obligees in a bond for conveyance of real estate, having brought suit, afterward acquired the interest in the land of both obligees in the bond. Held, that such suit was not a bar to a subsequent suit for specific performance, between the same parties concerning the same land. *Knott v. Stephens*, 3 Oregon, 235. G. conveyed land to K., reserving the free and perpetual right of way over such part of the premises as should be occupied by a passage-way ; and a cross passage was to be completed as described. K. executed a bond to G., undertaking to finish said passage-way on demand after a certain time. Afterward, the lot conveyed to K. became the property of H., the defendant, having been conveyed to him subject to the reservation. H. and K. were requested to finish the passage-way, but neglected to do so. Held, that a decree for specific performance of the obligation in the bond would not be made against K., he having sold the land, and that the bond was a personal obligation, and not a covenant running with the land. *Smith v. Kelley*, 56 Me., 64.

¹ *Hays v. Hall*, 4 Porter, 374 ; *McMorris v. Crawford*, 15 Ala., 271.

² *Ewins v. Gordon*, 49 N. H., 444. The assignee of a contract is bound to perform both the conditions of the contract in favor of the other party, and the conditions of the assignment, to entitle him to a specific performance of the original contract. So, too, where the other party has assented to the assignment, if he has not waived the conditions of the original contract, and is not a party to the assignment. *Jones v. Lynde*, 7 Paige Ch., 301.

³ *Duke v. Mayor of Exon*, 2 Freem., 183 ; *Vandenanker v. Desbrough*, 2 Vern., 96 ; *Moyses v. Little*, Ib., 194 ; *Robinson v. Perry*, 21 Ga., 183.

⁴ *Crosbie v. Tooke*, 1 M. and K., 431 ; *Morgan v. Rhodes*, Ib., 435. But see *Dowell v. Dew*, 1 Y. and C. C. C., 345, in which the court refused to decree the specific performance of an agreement for a lease in favor of the assignee, except upon the terms that the assignor should enter into the covenants of the lease. Where such acts have been committed by the assignee of a contract for a lease as would have created a forfeiture had the lease been actually executed, equity will not decree specific performance of such agreement against the purchaser of the land who has recovered judgment at law. *Jones v. Roberts*, 3 Hen. and Munf., 436. A court of equity will not decree specific performance against the assignee of a chattel who has received the legal title subsequent to the making of a contract respecting the same chattel which neither passed the legal nor the equitable title, even though he acquired it with notice. *Maulden v. Armistead*, 18 Ala., 500. As to right of assignee of a chose in action to sue at law in Massachusetts, see *Walker v. Brooks*, 125 Mass., 241.

plant and cultivate them on his own farm, and, at the joint expense of the parties, to pick and market the fruit. A. died, and his administrator sold his interest under the contract, to C. Held, that C. could enforce specific performance and payment of half the net proceeds of the sale.¹ All the assignees of a contract which has passed through several hands by assignment, should be joined in a suit for specific performance.² Where a vendor of land executed a bond for title, but did not receive the whole of the purchase money, and afterward became bankrupt, it was held that his assignee must be made a party defendant in a suit for specific performance of the contract to convey.³

§ 69. *Parties to bill in case of assignment.*—If the bill be filed by the vendor's assignee, the vendor, or if he is dead, his personal representative, must be made a defendant.⁴ It has been seen that when the contract has been assigned by the purchaser, a suit against the vendor should

¹ McKnight v. Robbins, 5 N. J. Eq., 1 Halst., 229. An owner of land supposed to contain minerals, by an instrument in writing granted to B. the right to dig a mine on the land, and to remove therefrom any mineral he might dig within a year. A few months thereafter, B., by an indorsement on the contract, assigned to C. all his interest, right, and privilege in the land, with the appurtenances, and all the benefit and advantages derivable from such instrument, after which B. filed a bill in equity against A. for specific performance of the agreement. Held that as B. had parted with all his interest in the subject of the suit, the bill must be dismissed. Gaston v. Plum, 14 Conn., 344. A., who owned a tract of land supposed to contain five hundred acres, sold to B. two hundred and fifty acres, to be selected by him, and the balance to C. B. made his selection, and the land was surveyed by C., and conveyed by A., in accordance with the survey. B.'s land falling short, he filed a bill against C. for the deficit, and a decree was granted accordingly. Lee v. Durrett, 4 Bibb., 20.

² Estill v. Clay, 2 A. K. Marsh, 497; Allison v. Shilling, 27 Texas, 450. In the case last cited, A. executed his title bond for land to B., who assigned the same to C.; C. gave his bond for part of the land to D., and D. conveyed by title bond to E. In a suit by the latter against A., it was held that those through whom the plaintiff derived his equitable title, must be made parties. "The plaintiff, in this case, seeks to divest the title out of the defendant, not in favor, however, of the party to whom he is bound by his bond or its assignment, but in favor of one claiming under a contract to which he is a stranger, and, it must be presumed, ignorant of its stipulations, and unadvised whether they have been fulfilled. Under these circumstances, we think, on principle and policy, the plaintiff should be required to make those through whom he claims the right of enforcing a contract in which he has no privity, parties to his suit." *Ib.*, per Moore, J.

³ Swepson v. Rouse, 65 N. C., 34.

⁴ Fulham v. M'Carthy, 1 H. L. Cas., 703, 722; Ryan v. Anderson, 3 Mad., 97; Hoover v. Donally, 3 Hen. & Munf., 316.

be brought by the assignee, making the purchaser a party.¹ A. having agreed to sell to B. certain land of C., contracted with C. for its purchase, and C. refused to complete, on this among other grounds. The price being adequate, and C. not alleging that he had ever refused, or was unwilling or would have objected to treat with B., or might have obtained better terms from him had he been apprised of the real situation, specific performance was decreed at the suit of A. and B.² But if the purchaser enter into an agreement to convey the estate to a sub-purchaser, and not that the original vendor shall convey it, such sub-purchaser is not a necessary party to a suit for the performance of the original contract.³ So, where the purchaser's assignee has been accepted in his place by the vendor, the original purchaser should not be made a party to the vendor's suit.⁴ Where A. agreed to assign to B. a contract for carrying the mails, which was only executed by A.; and B. filed a bill for specific performance against A. and C., to whom the contract had been assigned; it was held that D., the partner of C., who was one of A.'s sureties to the government, was a necessary party.⁵

§ 70. *Suit by assignee of mortgage.*—If the interest of a party in the contract for sale be mortgaged, the assignee of such mortgage may maintain a suit for specific performance. Accordingly, where A. agreed to sell certain property to B., and then mortgaged his interest under this agreement to C., and C. assigned his mortgage to D., it was held that D. might maintain a suit against B. to enforce the agreement between him and A.⁶

§ 71. *In case of sale of property under decree, or on execution.*—The purchaser of a vendee's title, sold under a

¹ *Ante*, § 68; Chadwick v. Platt, 11 Beav., 503.

² Nelthorpe v. Holgate, 1 Coll. C. C., 203.

³ Chadwick v. Maden, 9 Hare, 188; Fenwick v. Bulman, L. R. 9, Eq. 165. See Anon v. Walford, 4 Russ., 372; *ante*, § 59.

⁴ Holden v. Hayn, 1 Mer., 47; Hall v. Laver, 3 Y. & C., Ex. 191; *ante*, § 59.

⁵ Woodward v. Aspinwall, 3 Sandf., 272.

⁶ Browne v. London Necropolis Co., Week. R., 1857-1858, 188.

valid decree, succeeds to his position, and may maintain a suit for specific performance against the vendor. The vendor may file a bill to sell the premises in default of payment, so as to discharge himself of the vendee's equities. But the vendee has no right to a decree of sale against the vendor for the purpose of paying the unpaid purchase money.¹ Where land, under a contract of sale, but before conveyance or payment of the purchase money was taken on execution against the vendor, it was held that the vendee could not be relieved against a purchaser under the execution, except by paying to such purchaser the price paid by him, or the amount named in the contract.²

§ 72. *Personal contracts*.—When the agreement is personal, depending upon the learning, skill, solvency, or other characteristic of the contracting party, he alone can perform it. A contract between an author and publisher was accordingly held incapable of assignment.³ How far, in an agreement for a lease, the landlord relies on the solvency of the proposed lessee as a personal qualification, does not seem to have been fully settled.⁴ One who has represented himself to be an agent for an individual on whose personal qualities reliance has been placed, will not be permitted to sue as principal.⁵ Where the lessee of a farm who was insolvent permitted another person to become the apparent occupier of the premises, but with a secret trust for himself, and the landlord supposing that the trustee was the sole possessor, and relying on his solvency, agreed to grant him a new lease, in a suit by the original lessee against the landlord, specific performance of this agreement was refused, on the ground that the landlord had entered into it under the expectation of having the covenants of a re-

¹ *Fitzhugh v. Smith*, 62 Ill., 486.

² *Tomlinson v. Blackburn*, 2 Ired. Eq., 509.

³ *Stevens v. Benning*, 1 K. & J., 168. See *post*, § 87.

⁴ *Crosbie v. Tooke*, 1 M. & K., 431; *Morgan v. Rhodes*, *Ib.*, 435; *Dowell v. Dew*, 1 Y. & C. C. C., 345.

⁵ *Rayner v. Grote*, 15 M. & W., 365; *Field v. Maghee*, 5 Paige Ch., 539; *Rogers v. The Traders' Ins. Co.*, 6 *Ib.*, 584; *post*, § 86.

sponsible man, which he could not do, as there was no equity to compel the trustee to enter into the covenants.¹ And if a person make a contract with another, relying on his skill, but who is in fact a secret trustee, such person will not be compelled to perform the agreement for the *cestui que trust*.²

§ 73. *In case of agreement founded on personal considerations.*—Although the contract be not personal, yet if it be influenced by motives of kindness toward the trustee, or feelings of dislike for the concealed beneficiary, which are known to the other party, specific performance may be refused at the suit of the person on whose behalf the ostensible principal contracted.³ The plaintiff, who had tried without success to purchase an estate from the defendant, got the secretary of Lord Chancellor Nottingham to enter into a negotiation in his behalf, under the pretence that it was for the Lord Chancellor or his son. The defendant had several cases pending in chancery, and wishing to oblige the Lord Chancellor he made the agreement; but, upon discovering who the real purchaser was, refused to complete. The plaintiff's bill was dismissed, but specific performance was ultimately granted on payment by the plaintiff of the full value of the estate, which was a larger sum than that originally agreed.⁴ Where a lady, from family considerations, contracted with her son-in-law for a lease, for his accommodation, in the mansion house and demesne lands, specific performance was refused at the suit of his assignees in bankruptcy.⁵

§ 74. *Where an assignment is forbidden, or against*

¹ O'Herlihy v. Hedges, 1 Sch. & Lef., 123.

² Ibid; Featherstonaugh v. Fenwick, 17 Ves., 313.

³ Bonnet v. Sadler, 14 Ves., 528; *contra*, Lord Irnham v. Child, 1 Bro. C. C., 92; see Jordan v. Sawkins, 1 Ves. Jun., 402; Fellowes v. Lord Gwydyr, 1 R. & M., 83.

⁴ Phillips v. Duke of Buckingham, 1 Vern., 227. See *note* to foregoing case, 1 Sug. Vend., 10th ed., 349; Harding v. Cox, 1 Vern., 227, *note*; Scott v. Langstaffe, *cited* Lofft., 797.

⁵ Flood v. Finlay, 2 Ball & B., 9.

public policy.—When it is agreed that the instrument to be executed shall contain a provision against assignment, it operates to prevent not only an assignment of the interest when perfected, but also of the agreement.¹ There may, however, be, for the purposes of specific performance, a waiver of the proviso; as where the assignee of the proposed lessee is recognized by the landlord as tenant.² The assignment may be void as being illegal, or contrary to public policy: as the assignment by an officer in the army of his commission by way of mortgage;³ or of his full pay, or half pay;⁴ or of compensation granted to him for the reduction of his emoluments or the abolition of his office, when, by the terms of the grant, he may be required to return to the public service;⁵ or the assignment of the profits of a public office.⁶ Although it is not unlawful to assign a right at the time undisputed, but which, from circumstances subsequently discovered, it becomes necessary to litigate with third persons, and the assignee may maintain his bill in equity;⁷ yet it is contrary to public policy to permit the assignment of a mere naked right to sue.⁸

¹ Weatherall v. Geering, 12 Ves., 504. ² Dowell v. Dew, 1 Y. & C. C. C., 345.

³ Collyer v. Fallon, 1 T. & R., 459.

⁴ Davis v. Duke of Marlborough, 1 Swanst., 79; McCarthy v. Goold, 1 Ball & B., 387; Flarty v. Odlum, 3 Term. R., 681; Tunstall v. Boothby, 10 Sim., 540; Grenfell v. Dean of Windsor, 2 Beav., 544. When an assignor has forfeited his right to a specific performance by a refusal to perform, the assignee of the obligation cannot enforce performance. Frazier v. Broadnax, 2 Litt. Ky., 249.

⁵ Wells v. Foster, 8 M. & W., 149.

⁶ Hill v. Paul, 8 Cl. & Fin., 295.

⁷ Wilson v. Short, 6 Hare, 366.

⁸ Prosser v. Edmonds, 1 Y. & C., Ex. 481. In this case Lord Abinger, among other things, said: "Where an equitable interest is assigned, it appears to me, that in order to give the assignee a *locus standi* in a court of equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument. For instance, that a mortgagor who conveys his estate in fee to a mortgagee, has in himself an equitable right to compel a re-conveyance when the mortgage money is paid, is true. But that is a right reserved to himself by the original security. It is a right coupled with possession and receipt of rent, and he is protected so long as the interest is paid; and it does not follow that the assignee of the mortgage and the mortgagee may not adjust their rights without the intervention of a court of equity. In the present case, it is impossible that the assignee can obtain any benefit from his security, except through the medium of the court. He purchases nothing but a hostile right to bring parties into a

On the latter ground specific performance was refused of an agreement, by a person out of possession, to grant a present lease to a party who knew at the time that he could not obtain possession without a suit.¹ Upon the same principle contracts by which public companies seek to delegate powers with which they are entrusted by statute, involving special responsibilities which do not attach to the parties contracted with, are incapable of being enforced in equity.²

court of equity as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. So, where a person takes an assignment of a bond he has the possession; and although a court of equity will permit him to file a bill on the bond, it does not follow that he is obliged to go into a court of equity to enforce payment of it. So, other cases might be stated to show that where equity recognizes the assignment of an equitable interest, it is such an interest as is also recognized by third persons, and not merely by the party insisting on it. What is this but the purchase of a mere right to recover? It is a rule, not of our law alone, but of that of all countries, that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce." "It is the opinion of some learned persons that the old rule of law, that a chose in action is not assignable, was founded on the principle of the law not permitting a sale of a right to litigate. That opinion is to be met with in Sir William Blackstone, and the earlier reporters. Courts of equity, it is true, have relaxed that rule; but only in the cases which I have mentioned, where something more than a mere right to litigate has been assigned. Where a valuable consideration has passed, and the party is put in possession of that which he might acquire without litigation, there courts of equity will allow the assignee to stand in the right of the assignor."

¹ Bayly v. Tyrrell, 2 Ball & B., 358. In Williams v. Evans, 1 C. B., 717, tried in the English court of common pleas, A., the owner of a term, having died in 1828, B., his brother, who had previously been in possession of a portion of the premises, took and remained in possession of the whole until 1829, when he died leaving all his interest in the property to C., who thereupon entered and continued in undisputed possession until 1841, when D., a brother of A., took out letters of administration, and sold his interest in the property, as such administrator, for ten pounds. The transaction was held void, both at common law and under the statute of 32 Henry VIII., Ch. 9, which prohibits any person from selling or buying any pretended rights or titles to any lands, unless the vendor has been in possession of the same, or of the reversion, or in receipt of the rents thereof, for a year before the sale. But the sale of an expectancy is not within the mischief of the foregoing statute; such a sale not being a claim to any present right or title, but of the possibility that one may thereafter exist. Cook v. Field, 15 Q. B., 460; Fry on Specif. Perform., 55, 56.

² Johnson v. Shrewsbury & Birmingham R.R. Co., 3 De G. M. & G., 914; Beman v. Rufford, 1 Sim. N. S., 550; S. C. 7, Rail. C., 48; Gt. Northern R.R. Co. v. Eastern Counties R.R. Co., 9 Hare, 306. Although a concluded contract may be assignable, yet it is otherwise as to a mere offer. "In case of an offer by A. to sell to B., an acceptance of the offer by C. can establish no contract with A., there being no privity." Fry on Specif. Perform., 57; Meynell v. Surtees, 3 Sm. & G., 101, 117.

§ 75. *Liability of assignee with notice.*—Where a party having entered into an agreement for sale, afterward aliens or assigns the property, or contracts to do so, to a person who has notice of the original contract, the latter will be liable to perform it at the suit of the purchaser.¹ And we have seen that all persons having, or claiming to have, an interest in the land, obtained after the date of the contract sought to be specifically enforced, with notice, are necessary parties in a suit to compel conveyance.² “If the contract is a binding one, it can be enforced against any party in whom is vested the legal and beneficial interest in the property.”³ “If he is a purchaser with notice, he is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree.”⁴ The following case illustrates this principle: A., who was the lessee of a college, executed a sub-

¹ Howard v. Hopkins, 2 Atk., 371; Ford v. Crompton, 2 Bro. C. C., 32; Jackson's Case, 5 Vin. Abr., 543, Pl. 3; Jalabert v. Duke of Chandos, 1 Ed., 372; Brooke v. Hewitt, 3 Ves., 253; Knollys v. Alcock, 5 Ib., 648; Crofton v. Ormsby, 2 Sch. & Lef., 583; Meux v. Maltby, 2 Swanst., 277; Spence v. Hogg, 1 Coll. C. C., 225; Dowell v. Dew, 1 Y. & C. C. C., 345; Goodwin v. Fielding, 4 De G. M. & G., 90; Potter v. Saunders, 6 Hare, 1; Shaw v. Thackray, 1 Sm. & G., 537; Hersey v. Giblett, 18 Beav., 174; Foss v. Haynes, 31 Me., 81; Laverty v. Moore, 33 N. Y., 658; New Barbadoes Toll Bridge v. Vreeland, 4 N. J. Eq., 3 Green, 157.

² *Ante*, § 64. See Morris v. Hoyt, 11 Mich., 9; Seager v. Burns, 4 Minn., 141; Stone v. Buckner, 12 Smed. & Marsh, 73; Scarborough v. Arrant, 25 Texas, 129; Fullerton v. McCurdy, 4 Lansing, N. Y., 132. Where a person contracts to sell land, and subsequently conveys the same to a third party who has notice of the prior contract of sale, such third party stands in the place of his vendor; and if equity would decree specific performance against such vendor, it will render a like decree against such subsequent purchaser. Information, from whatever source derived, which would excite apprehension in an ordinary mind, and prompt a person of average prudence to make inquiry, will be sufficient notice. Notice to the agent in such case, will be notice to the principal, even though the principal takes the matter out of the agent's hands while the latter is engaged in the negotiations, and completes it himself. Bryant v. Booze, 55 Ga., 438.

³ Lord St. Leonards, in Saunders v. Cramer, 3 Dr. & W., 99.

⁴ Lord Rosslyn, in Taylor v. Stibbert, 2 Ves. Jun., 437. Where land has been sold by a vendor subsequent to a written agreement by him, that he will convey to another person in a certain event, in a bill by such person against the vendee, the vendor, or his personal representatives, should be made parties. Lewis v. Madison, 1 Munf., 303; Dailey v. Litchfield, 10 Mich., 29. In a suit for specific performance, by the obligee of a bond conditioned to convey real estate, one who has purchased from the obligor after the obligee's note given for the purchase money was overdue, is not a proper party. In such case, the obligor and his heirs are the proper defendants. Harrington v. Pinson, 30 Miss., 30.

lease of certain land for fourteen years, and covenanted to take a new lease from the college, and to renew the plaintiff's lease with three years added to it, or answer the want thereof in damages, and that the wood granted to the plaintiff by the lease, was to be full fourteen years' growth before it could be cut. A. having renewed and assigned his lease to B., who had notice of A.'s covenant with the plaintiff, it was decreed that B. should execute to the plaintiff a new lease with the additional three years, pursuant to A.'s covenant.¹ So, if a person who has a prior title, gets in the subsequent estate which is affected by the contract, with notice of it, his elder title will not protect him from the performance of the contract. Where, therefore, an equitable mortgagor entered into a contract for a lease, and afterward the mortgagee, whose mortgage was prior to the agreement, purchased the estate with notice, he was held liable to specifically perform the agreement.² And where A., who had only the equity of redemption, agreed to sell to B., and afterward A. and his mortgagee conveyed to C., who had notice of A.'s contract with B., it was held that B. was entitled to specific performance on the part of C.³

¹ *Finch v. Earl of Salisbury & Hawtrey*, Finch, 212.

² *Smith v. Phillips*, 1 Ke., 694.

³ *Lightfoot v. Heron*, 3 Y. & C. Ex., 586. In *Bird v. Hall*, 30 Mich., 374; Bird having contracted to purchase certain land of Hall, and partly paid for it, contracted to sell the same land to McFee, who also partly paid for it and was put in possession, the balance of the purchase money not being yet due. Afterward Hall, disregarding the rights of Bird, conveyed the land to McFee, who was irresponsible, thus depriving Bird of his security for what was thereafter to become due him from McFee. A bill was thereupon filed by Bird, praying that McFee might be decreed to convey to the complainant, in specific performance of the contract of Hall, in whose shoes as his assignee he then stood. Cooley, J., delivering the opinion of the court, said: "It seems clear, that a conveyance as prayed by the bill, would be strictly equitable, as it would place the parties where they have agreed to place themselves by their contracts. Complainant was entitled to a conveyance from Hall on payment of the balance due him, which he has offered to make; and he was then entitled to hold the title, until he was paid in full by McFee. This is conceded by defendants. But they insist that complainant has, at law, an ample remedy against Hall, if he suffers a loss in consequence of Hall's conveyance to McFee; and that as it is not alleged that Hall is irresponsible, there is no sufficient ground for equitable interference. What complainant loses by this conveyance, is his security for the ultimate payment by McFee. Whether a loss of the security would result in a loss of the debt, cannot yet be determined; and any present right of action at law would give him nominal damages only. A right of action against him at a future day,

Where one holds a deed as an escrow, and refuses to deliver the same, in a suit for specific performance of the instrument, he is a proper party.¹

§ 76. *Extent of rule as to notice.*—The principle of notice is not restricted to contracts of sale, but is equally applicable to all agreements and covenants binding the land in equity, which may be enforced against any person into whose hands the land may come. Specific performance will therefore be granted of all covenants permanently affecting the enjoyment of the land, which are enforced in equity against all subsequent purchasers with notice, whether the covenants be or be not such as would run with the land in the hands of subsequent purchasers at law.² And contracts to devise lands have been enforced against persons claiming them under the party contracting to make the will.³

§ 77. *Liability of company upon formation of new company.*—A species of assignment results when a railroad or other public company, after entering into a contract, becomes consolidated with another company; liability under the then existing contracts of the company being transferred to the new company thus formed.⁴

§ 78. *Liability of assignee of equitable title.*—An agree-

after the personal remedy against McFee had proved ineffectual, might or might not find him in a condition to respond, even if it be conceded that at present he is entirely responsible. Complainant cannot justly be compelled to run this risk. These parties cannot be allowed to deprive him of his security, and turn him over to the contingencies of successive suits at law after his demand has matured. He has a right to be protected against the suits and contingencies, by having ample and effectual security in his own hands, and the remedy in equity was alone adequate to the case."

¹ Davis v. Henry, 4 West Va., 571.

² Tulk v. Moxhay, 2 Ph., 774; Cole v. Sims, Kay, 56.

³ Goylmer v. Paddiston, 2 Ventr., 353; S. C. as Goilmer v. Battison, 1 Vern., 48. As to agreements to make wills containing peculiar dispositions, see Lord Walpole v. Lord Orford, 3 Ves., 402; Jones v. Mertin, 5 Ib., 266, note; Fortescue v. Hennah, 19 Ib., 67; Needham v. Kirkman, 3 B. & A., 531; Needham v. Smith, 4 Russ., 318; Logan v. Weinhold, 1 Cl. & Fin., 611; Jones v. How, 7 Hare, 267; Barkworth v. Young, 4 Drew, 1; Eyre v. Menro, 26 L. J. Ch., 757.

⁴ Stanley v. Chester & Birkenhead R.R. Co., 9 Sim., 264; S. C. 3, M. & Cr., 773; Earl of Lindsey v. Gt. Northern R.R. Co., 10 Hare, 664, and cases cited and commented on.

ment entered into by the owner of a chattel with the equitable owner of one-half of the chattel, to hold such half interest subject to the order of a third person, and an assignment of it to a party having knowledge of the agreement, may be enforced against the assignee.¹ Where there is a purchase of real or personal property from the legal owner, to which a third person has an equitable title, and the purchase is made in the usual course of business, without notice of the equitable title, for a valuable consideration, or if the purchaser incurs any new responsibilities upon the credit of it, he is considered a *bona fide* purchaser, against whom the owner in equity can have no relief. But if no consideration is paid, and the property is assigned, and received in payment of, or as security for, a pre-existing debt, the assignee must take it subject to all the equity to which the assignor was subject.² Where A. contracted for the purchase of lands, became insolvent, and assigned them to pay certain debts and to return the residue to himself, and B., a creditor not included in this assignment, with notice of A.'s claim purchased the lands of the owner for the sum due on A.'s contract, it was held that he could not be compelled to convey to A.'s assignees until his debt and the purchase money were paid to him.³

§ 79. *Suit by holder of equitable title.*—Parties whose interests are merely equitable may represent the inheritance in a bill for specific performance; as, for instance, the tenant for life and the contingent remainder man in fee, provided the issue of the remainder man will take, if he fails to do so by reason of the contingency.⁴ Where the grantee of an equitable title to land seeks to compel a conveyance of the legal title, his grantor need not be made a party.⁵ The owner of an equitable interest in land agreed to convey an interest therein to another, subject to the approval

¹ Clark v. Flint, 22 Pick., 231.

² Root v. French, 13 Wend., 573; Buffington v. Gerrish, 15 Mass., 156.

³ Suydam v. Mastin, Wright, 698.

⁴ Sohier v. Williams, 1 Curtis, 479.

Elliott v. Armstrong, 2 Blackf., 198.

of the holder of the legal title, and with his knowledge; the purchaser agreeing to build a depôt and side track near the same, which he did at his own expense, thereby greatly increasing the value of the tract. Held, that the contract should be enforced subject to the rights of the holder of the legal title for any sum due him.¹

§ 80. *Notice to vendor of agreement of vendee to assign contract.*—A vendor of land may receive the balance of the purchase money and convey the land to the purchaser, without regard to the receipt of a notice from a third person that the purchaser had agreed to assign the contract to him.² A vendor agreed to sell leaseholds, which were under a heavy rent, and received part of the purchase money. The purchaser afterward agreed to assign to a bank the contract of purchase by way of security for money advanced, and the bank notified the vendor of this agreement. The bank afterward refused to complete, but this was not known to the vendor. The purchaser, after the time fixed for completion, paid the balance of the purchase money; the vendor executed an assignment to him; and the purchaser conveyed to an assignee without notice of the security to the bank. Held, that the vendor had a right to complete without giving notice to the bank, and that the bank had no remedy against him.³

§ 81. *Doctrine as to liability of public company under contract of its promoters.*—An exception to the general rule, that those who entered into the contract are alone proper parties to the suit, arises in the case of a public company sued for the specific performance of contracts entered into by its promoters previous to its incorporation, the company standing in the place of the promoters.⁴ The principle is said to have been first introduced in the case of

¹ Booders v. Murphy, 78 Ill., 81.

² Suydam v. Mastin, Wright, 698.

³ M'Creight v. Foster, L. R. 5, Ch. 604.

⁴ Caledonian & Dumbartonshire Junction R.R. Co. v. Magistrates of Helensburgh, 2 M'Q., 394. See *ante*, § 50.

Edwards v. The Grand Junction R.R. Co.,¹ in which the agent of the promoters of a railroad entered into an agreement with the trustees of a public highway, during the pendency of the railway bill before Parliament, as to certain clauses which the trustees wished to have inserted in the bill, and to have the same confirmed under the seal of the company proposed to be incorporated; the trustees agreeing to offer no opposition to the bill, and that the contract should be void when the agent delivered to the trustees the engagement of the proposed company to the same effect. The railroad bill having passed, the company undertook to make a road across the railway of a less width than that stipulated for by the before-mentioned clauses. In a suit brought by the trustees against the company for specific performance and an injunction, the company was held bound by the agreement entered into by the agent of the promoters. Lord Cottenham, in delivering the judgment of the court, said: "The question is not whether there be any binding contract at law, but whether this court will permit the company to use their powers under the act in direct opposition to the arrangement made with the trustees prior to the act upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of, all that the projectors had before. They are entitled to all their rights and subject to all their liabilities. If any one had individually projected such a scheme, and in the prosecution of it had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser. But in this court it would be otherwise. So here, as the company stand in the place of the projectors, they cannot repudiate arrangements into which such projectors had entered.

¹ 1 M. & Cr., 650; 1 Rail. C., 173; 7 Sim., 337.

They cannot exercise the powers given by Parliament to such projectors, in their corporate capacity, and at the same time refuse to comply with those terms upon the faith of which all opposition to their obtaining such powers was withheld."¹

§ 82. *Contract of promoters must have been adopted by company.*—To render the doctrine in question applicable, the company, after its incorporation, must have taken the benefit of the agreement, and thus adopted it by the enjoyment of the consideration. It is not sufficient, however, that the opposition to the proposed bill was withdrawn, that being a consideration moving, not to the company, but to the promoters. Accordingly, where a company having been incorporated in consequence of the withdrawal of the plaintiff's opposition, did not enter upon the land, or in any way adopt the contract, except by unsuccessful negotiations, specific performance of the contract was refused, and the court declined to order the defendants to admit the validity of the contract in an action at law.² It has been considered that the cases do not proceed on the principle of contract through the agency of the promoters, but on the ground "that the court will not allow a body to exercise powers acquired by means of a previous contract, without carrying such contract into full effect. To this extent the court acts negatively. But having once acquired jurisdiction, its action is positive as well as negative; and therefore it will not merely restrain the doing of acts contrary to the agreement, but will enforce every portion of it."³

§ 83. *Contract of promoters must be capable of perform-*

¹ See *Stanley v. Chester & Birkenhead R.R. Co.*, 3 M. & Cr., 773; *S. C.* 1 Rail C., 58; 9 Sim., 264; *Lord Petre v. Eastern Counties R.R. Co.*, 1 Rail C., 462; *Greenhalgh v. Manchester & Birmingham R.R. Co.*, 3 M. & Cr., 791; *Vauxhall Bridge Co. v. Earl Spencer, Jac.*, 64; *East London Water Works v. Baily*, 4 Bing., 283.

² *Gooday v. Colchester, etc., R.R. Co.*, 17 Beav., 132; *Williams v. St. Georges Harbor Co.*, 3 Jur. N. S., 1014; *Preston v. Liverpool, Manchester, and Newcastle R.R. Co.*, 17 Beav., 115.

³ *Fry on Specif. Perform.*, 64; *Earl of Lindsey v. Gt. Northern R.R. Co.*, 10 Hare, 664; *Eastern Counties R.R. Co. v. Hawkes*, 5 House of Lds., 356.

ance by company.—The agreement must likewise be for something warranted by the terms of the incorporation, and which the company has therefore power to perform. Where the magistrates of a certain town agreed with the promoters of a railroad, to afford the proposed company facilities for the construction of the road through the town, and to petition Parliament in favor of the bill, the promoters stipulating that the company should pay for the construction of a quay and harbor, which the magistrates were to apply to Parliament for power to make, specific performance was refused on the ground that the act to be done by the company would not be within its powers when incorporated; the arrangement being for the application of the funds raised under legislative authority for the purposes of the railway, to an object foreign thereto.¹ So, an agreement, by the promoters, to pay five thousand pounds to a person for not opposing a bill in Parliament, was held beyond the powers of a railroad company when incorporated, and therefore incapable of being enforced against the company.²

¹ *Caledonian and Dumbartonshire R.R. Co. v. Magistrates of Helensburgh, supra.*

² *Preston v Liverpool, Manchester, and Newcastle Junction R.R. Co.*, 5 House of Lds., 605, 621. And see *Leominster Canal Co. v. Shrewsbury and Hereford R.R. Co.*, 3 K. and J., 654. It has been seriously questioned whether a public company, after its incorporation, could be sued for the specific performance of contracts entered into before the passing of its act, by the promoters, on the ground that the company stands in the place of the promoters. The doctrine was acted on by Lords Cottenham, Campbell, and St. Leonards, but it was criticised by Vice-Chancellor Wood, and disapproved by Lords Brougham and Cranworth. In the *Caledonian and Dumbartonshire Junction R.R. Co. v. Magistrates of Helensburgh*, 2 M'Q., 391, the latter observed that the doctrine in question could only be supported on the assumption that the company, when incorporated, was, in substance, though not in form, a body succeeding to the rights, and coming into the place, of the projectors, which he argued was not the case; that the incorporated body was not confined to the projectors, and might even include none of them; that the act, when passed, became the charter of the company, prescribing its duties, and declaring its rights; that all persons becoming shareholders had a right to consider that they were entitled to all the benefits held out by the act, and liable to no obligations beyond those which were there indicated; that to permit other terms to be imposed on the shareholders beyond the conditions of incorporation, would lead to the injury of the shareholders, and often to a fraud, or at least surprise, on the legislature; and that to render special terms binding on the company, they ought to be the subject of special clauses in the act, whereby the whole truth could be disclosed. See *Fry on Specif. Perform.*, 66; *Williams v. St. G.'s Harb. Co.*, 3 Jur. N. S., 1014.

§ 84. *Agent not in general a proper party.*—Contracts made by agents, sometimes give rise to an exception to the rule, that only those who enter into the contract are proper parties to the suit. When the agent contracts as such, in the name of his principal, the agent ought not in general to be made a party.¹ A., as the agent of B., contracted to sell land belonging to another, who afterward adopted the sale. In a suit to enforce specific performance against the owner of the land, it was held that B., and the heirs of A., were improper parties.² But it is otherwise, when the agent appears on the face of the agreement as a principal, or there is no proof of the agency, or there are special circumstances rendering it proper to make the agent defendant, as where he claims to have made the agreement for his own benefit.³ If the agency be not apparent on the contract, the nominal contractor should, unless the plaintiff can prove the agency, be made a party to the suit as a defendant.⁴ Where the contract is made with an agent, and is under seal, in a suit for specific performance by the principal, the defendant has a right to have the agent made a party.⁵ In a suit by the vendor of land sold at auction, the auctioneer may be joined as plaintiff, on the ground that he is interested in the contract, or is liable for the deposit.⁶ In general, an auctioneer

¹ Macnamara v. Williams, 6 Ves., 143; Smith v. Clarke, 12 Ib., 477; King of Spain v. De Machado, 4 Russ., 225; Dahoney v. Hill, 20 Ind., 264.

² Roby v. Cossit, 78 Ill., 638.

³ Taylor v. Salmon, 4 M. and Cr., 134. See Marshall v. Sladden, 7 Hare, 428; Lees v. Nuttall, 1 R. and M., 53. A contract under seal entered into by A. B. "in behalf of the city of Providence," but signed by A. B., who was Mayor of the city, in his own name, was held not the contract of the city, but of A. B. personally, and a demurrer to a bill for specific performance filed by the city was sustained. City of Providence v. Miller, 11 R. I., 272.

⁴ 1 Danl. Ch. Pr., 205; Fulham v. McCarthy, 1 H. L. C., 703; Chadwick v. Maden, 9 Hare, 188. In Nelthorpe v. Holgate, 1 Coll., 217, 218, it was held that an agent might join as co-plaintiff.

⁵ Cooke v. Cooke, 2 Vern., 36; Cope v. Parry, 2 Jac. and W., 538. 1 Danl. Ch. Pr., 4th Am. Ed., 195.

⁶ Jones v. Littledale, 6 A. and E., 486; Magee v. Atkinson, 2 M. and W., 440. If an agent in his own name, but on behalf of his principal, enters into an agreement to execute a lease of lands of his principal, he will be personally liable for the execution of the same. Norton v. Herron, 1 C. and P., 648; S. C., 1 R. and M., 229; Turner v. Christian, 29 Eng. L. and Eq., 103; Lennard v. Robinson, 32 Ib., 127; Kennedy v. Gouveia, 3 Dowl. and Ryl., 503; Meyer v. Barker, 6 Binn,

holding the deposit on a purchase, should not be made a defendant when the deposit is small, unless he refuses to pay it into court when required. But when the deposit is a considerable sum, he may be made a defendant unless he has paid it into court before suit brought.¹

§ 85. *When agent liable.*—If an agent contract as principal, he is liable on the contract as principal, in cases of specific performance in equity, as well as of damages at law.² “It is competent to show that one or both of the contracting parties were agents for other persons, and that they acted as such agents in making the contract, so as to give the benefit of the contract to, and charge with liability, the unnamed principal, whether the agreement is, or is not, required to be in writing by the statute of frauds. This evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent in signing the agreement in pursuance of his authority, is in law the act of the principal. But on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would allow parol evidence to contradict the written agreement, which cannot be done.”³ Where the contract was entered

228, 234. But if he enter into a written contract describing himself as agent, and naming his principal, he is not personally liable, unless he had no authority to make the contract, or in making it exceeded his authority. *Downman v. Jones*, 9 Jur., 454, Ex. Ch. So, although a person without authority signs an instrument in the name of, and as agent for, another, he cannot be treated as a party to such instrument, and be sued upon it, unless he is shown to have been in reality the principal. *Dart's V. and P.*, 85.

¹ *Earl of Egmont v. Smith*, L. R. 6, Ch. D. 469.

² *Jones v. Littledale*, 6 A. and E., 486; *Magee v. Atkinson*, 2 M. and W., 440.

³ *Higgins v. Senior*, 8 M. and W., 844. In *Williams v. Chrislee*, 4 Duer, 29, the court, per Bosworth, J., said: “We consider the doctrine well settled, that every written contract made by an agent, in order to be binding on his principal, must purport on its face to be made by the principal, and must be executed in his name, and not in the name of the agent. It cannot be shown by parol, that the alleged agent in signing his own name to the contract, in fact signed his name as agent, and thus convert a contract which, on its face, is his own, into a contract of his alleged principal, and make it enforceable as such. This would be altering the plain meaning and clear legal import of written contracts,

into by the agent in his own name, and he urged that, as he was a mere agent, the bill ought to be dismissed as against him, the court said that "the signing of the agreement was sufficient to subject him to the liability of performing it."¹ "It would appear, that if at the time the contract was signed, both A. and B. understood that A. was acting as the agent of C., and B. were afterward to sue A. for specific performance as principal, A. might allege the understanding between himself and B. at the time, and give parol evidence of it, and that if the allegation were proved, it might furnish a valid defence, though the circumstances supposed would, of course, furnish no defence at law, unless by way of equitable plea."

§ 86. *Liability of principal on contract of agent.*—Whether where a person, appearing as principal, in fact contracted as agent for another, the latter can, when disclosed, sue or be sued as principal, may depend upon the consideration as to whether or not one party relied on the personal qualifications of the other. If in a contract between A. and B. it can reasonably be presumed that B. relied on A. personally, A. cannot declare himself the agent of C. in the transaction. So, if A. were to enter into an agreement with B. for the purchase from him of his estate, B. could not afterward announce himself as the agent of C., who, not having the estate, could not perform the contract. It is said to hold good universally that a contracting party cannot "declare himself the agent of an unnamed principal, except where the contract, if really made by the contracting party, might have been assigned by him to the party suing as principal."² Railway directors

by unwritten evidence, which is inadmissible." And see *Minard v. Mead*, 7 Wend., 68; *Spencer v. Field*, 10 Ib., 88; *Evans v. Wells*, 22 Ib., 337; *Stephens v. Cooper*, 1 Johns. Ch., 429; *Newcomb v. Clarke*, 1 Denio, 226; *Fenly v. Stewart*, 5 Sandf., 101; *McTyer v. Steele*, 26 Ala., 487; *Matter of the Bank of British North America*, 5 Gray, 567. See, however, *Huntingdon v. Knox*, 7 Cush., 371; *Edwards v. Simmons*, 27 Miss., 302; *Ruiz v. Norton*, 4 Cal., 355.

¹ *Chadwick v. Maden*, *supra*.

² *Fry on Specif. Perform.*, 69, 70; *Higgins v. Senior*, *supra*.

³ *Fry on Specif. Perform.*, 68; *ante*, § 72. Where a party to a contract for

are agents of the company, and their personal liability in a suit upon a contract made by them must be governed by the ordinary law of principal and agent. But a shareholder may maintain a bill against directors personally where he charges them as trustees, and seeks redress against them for a breach of duty to the company of which he is a member.¹ It will often happen that a suit for specific performance against an agent will fail from his incapacity to perform the subject of it. No one person can maintain a suit for the specific performance of a public duty imposed for the public benefit.²

§ 87. *Death of party to contract who was its inducement.*—When the death of a party determines the interest (as in the case of a tenant for life, or of one who has a temporary or contingent interest, or an interest defeasible upon a contingency), and there is no other plaintiff or defendant, there is an end to the suit.³ But if such interest survives to the remaining party, and there is no demand against the representatives of the deceased, the proceedings do not abate.⁴ When the moving inducement to the contract was the learning, genius, skill, taste, or other personal qualification of one of the parties, his death discharges the contract, and no liability attaches to his personal representatives for non-performance after his decease;⁵ the personal services of an individual being incapable of performance by another, either before or after his death.⁶ If an author agrees to write a work, and dies previous to completion, the contract cannot be enforced against his

the purchase of land acted not only for himself, but for his co-plaintiff, it was held that the latter was entitled to the benefit of the contract sought to be enforced. *Washburn v. Fletcher*, 42 Wis., 152.

¹ *Ferguson v. Wilson*, L. R. 2, Ch. 77.

² *Getty v. Hudson River R.R. Co.*, 2 Barb., 617.

³ Story's Eq. Pl., Sec. 356.

⁴ *Ibid*, Sec. 357. In Iowa, under the statute either party may come into court to enforce the contract, or the administrator may ask for power to make the conveyance. *Collins v. Vandever*, 1 Iowa, 573.

⁵ *Siboni v. Kirkman*, 1 M. & W., 423.

⁶ *Clark v. Gilbert*, 32 Barb., 581. See *ante*, § 72.

executors.¹ So, where a master who has engaged to instruct an apprentice, dies before the end of the term, his representatives will be excused.² The same principle was held applicable to an agreement to build a lighthouse, the construction of which called for science and skill.³

¹ *Marshall v. Broadhurst*, 1 Tyrw., 349; S. C. 1, Crompt. & Jer., 405.

² *Baxter v. Burfield*, 2 Str., 1266.

Wentworth v. Cock, 10 Ad. & E., 45.

CHAPTER II.

PLEADINGS.

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104. Defence that wife did not join in contract.
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§ 88. *Must show that there can be no redress at law.*— Unless the bill, answer, and exhibits render clear the rights of the parties seeking specific performance, a decree will be refused.¹ It is incumbent upon the plaintiff to show that he cannot be indemnified in damages for the breach of the contract;² and if he omit to allege, or it does not appear from the facts disclosed in the bill, that he has not a complete remedy at law, the defendant may demur to the bill

¹ *Waters v. Brown*, 7 J. J. Marsh, 123. To entitle the plaintiff to show fraud in the defendant as the ground of a decree for the specific performance of an agreement, it must be substantially alleged in the bill. *Sawyer v. Mills*, 20 L. J. Ch., 80; *Hayward v. Pursey*, 3 De G. & Sm., 399; *Crocker v. Higgins*, 7 Conn., 34; *Booth v. Booth*, 3 Litt., 57; *Miller v. Colton*, 5 Ga., 346; *Gouverneur v. El-mendorf*, 5 Johns. Ch., 79; *Magniac v. Thomson*, 2 Wall, Jr., 209. If there be unfounded allegations of fraud, or no averment of fraud or injury, this circumstance may be taken into account by the court in determining whether or not to grant the relief asked. *Price v. Berrington*, 3 M. & G., 486; *Eyre v. Potter*, 15 How., 56; *Fisher v. Boody*, 1 Curtis, 211; *Ellerbe v. Ellerbe*, 42 Ala., 643.

² *Powell v. Central Plank Road Co.*, 24 Ala., 441; *McClane v. White*, 5 Minn., 178. But see *ante*, § 5.

on that ground.¹ But in a suit for the specific performance of a contract for the sale of land, the complainant may shape his bill, either to obtain specific performance or a cancellation of the contract, even though he might have had an action at law on the covenant.² A bill to compel a vendee to pay the purchase money may sometimes be sustained in equity; but not where it alleges only the facts ordinarily set forth in a declaration in debt, covenant, or assumpsit, in a suit at law for the purchase money.³ Where land is sold under an order of the court, and the purchaser signs an acknowledgment of the purchase, and fails to complete it, the officer making the sale, who is the only necessary party complainant, may file a bill for specific performance without the direction of the court, and it will not be a ground of demurrer that the purchaser might have been compelled to abide by his contract by attachment for contempt.⁴

§ 89. *Must appear from bill that plaintiff is entitled to a decree.*—To entitle a complainant to a decree for specific performance, he must show affirmatively that he ought to

¹ Botsford v. Beers, 11 Conn., 369; Prewitt v. Jenkins, 1 Blackf., 294; Noyes v. Marsh, 123 Mass., 286; *ante*, § 9. Where the plaintiff averred a sale at a stipulated sum, increased by a contingency alleged to have happened, and prayed for a decree for the balance unpaid, his bill was dismissed on the ground that he had a competent remedy at law. Kauffman's Appeal, 55 Pa. St., 383.

² Mills v. Metcalf, 1 A. K. Marsh, 477. A bill which seeks specific performance must be framed with that view. Pitts v. Cable, 44 Ill., 103. Under the statute of Massachusetts of 1853, Ch. 371, an action for relief in equity to enforce the specific performance of a contract is to be treated as a suit in equity. Irvin v. Gregory, 13 Gray, 215.

³ Kauffman's Appeal, *supra*.

⁴ Bowne v. Ritter, 26 N. J. Eq., 456. When property is sold pursuant to an order of court, the usual method of compelling a purchaser to complete his purchase, is by an order to show cause why an attachment should not issue against him as for contempt. But the parties in interest may, if they see fit, file a bill for specific performance; and sometimes the court will itself, in a case of doubt, and where the ends of justice will be served by it, direct that to be done. But the fact that the bill was filed without the direction of the court, cannot be objected by the defendant. *Ibid.* See Brasher v. Cortlandt, 2 Johns. Ch., 505; Wood v. Mann, 3 Sumner, 318; Gordon v. Saunders, 2 McCord Ch., 151; Ely v. Perrine, 2 N. J. Eq.; 1 Green, 396; Cazet v. Hubble, 36 N. Y., 677; Silver v. Campbell, 25 N. J. Eq., 465. Under special circumstances, a receiver has been appointed as between a vendor and purchaser during a suit for specific performance. Hall v. Jenkinson, 2 Ves. and B., 125; Boehm v. Wood, 2 J. and W., 236; Shakel v. Marlborough, 4 Mad., 463.

have relief;¹ but he need not allege the defendant's ability to perform.² The bill should state the case with reasonable certainty and precision, and contain every averment requisite to entitle the plaintiff to the relief asked; as a defect in this respect cannot be supplied by inference.³ Where several are joined as plaintiffs, if the bill shows that their claims are inconsistent, or if any of them have no claim, the misjoinder will either be fatal to the suit, or the court will only make such a decree as will leave their claims, in respect to each other, undecided.⁴ But if one of several plaintiffs, who are properly joined, claims further relief peculiar to himself, it is not a ground for demurrer.⁵ If there be an averment of a devise, a will in writing must be alleged.⁶ So, in the case of a grant, a deed must be alleged.⁷ But public statutes and other matters, of which the court takes judicial notice, need not be set forth.⁸ A bill which shows that the contract sought to be enforced is within the statute of frauds, is demurrable.⁹ But although a bill which prays

¹ *Morey v. Farmer's Loan, etc.*, 14 N. Y., 302; *Clough v. Hart*, 8 Kansas, 487. In equity "the object aimed at is a complete decree on the general merits, and not that the litigation should be reduced to a single issue; and as all issues, whether of law or fact, are decided or adjusted for decision by the court, it is not essential to keep them strictly distinct. The rules, therefore, of pleading are less stringent than at law; but they are equally regulated by principle." *Adam's Eq.*, 301.

² *Greenfield v. Carlton*, 30 Ark., 547. See *Morrow v. Lawrence*, 7 Wis., 574, as to sufficiency of complaint in an action to compel a conveyance.

³ *Hammond v. Messenger*, 9 Sim., 327; *Wright v. Dame*, 22 Pick., 55; *M'Intyre v. Trustees of Union College*, 6 Paige Ch., 239; *Cowles v. Buchanan*, 3 Ired. Eq., 374.

⁴ *Adam's Eq.*, 301; *Cholmondeley v. Clinton, T. and R.*, 107; *Thurman v. Shelton*, 10 Yerg., 383; *Mix v. Hotchkiss*, 14 Conn., 32; *Ellicott v. Ellicott*, 2 Md. Ch., 468. *Ante*, § 55.

⁵ *Clarkson v. De Peyster*, 3 Paige Ch., 320.

⁶ See *Belloat v. Morse*, 2 Hayw., 157; *Martin v. M'Bryde*, 3 Ired. Eq., 531; *Van Cortlandt v. Beekman*, 6 Paige Ch., 492.

⁷ See *King v. Trice*, 3 Ired. Eq., 568.

⁸ *U. S. v. La Vengeance*, 3 Dallas, 297; *Owings v. Hall*, 9 Peters, 607.

⁹ *Chambers v. Lecompte*, 9 Mo., 575. If the bill shows on its face that the case is within the statute of limitations, the plaintiff should state the facts and circumstances upon which he relies to take the case out of the operation of the statute. *Dunlap v. Gibbs*, 4 Yerg., 94; *Wisner v. Barnet*, 4 Wash. C. C., 631; *Field v. Wilson*, 6 B. Mon., 479; *Humbert v. Rector of Trinity Ch.*, 7 Paige Ch., 197; *Maxwell v. Kennedy*, 8 How., 210.

for the specific performance of a parol contract to convey land, or a repayment of the purchase money, will not ordinarily be sustained, yet in such a case, where land was paid for by the bond of a third person indorsed to the vendor, who obtained judgment thereon, the court ordered an assignment of the judgment to the purchaser on his filing a bill for specific performance.¹

§ 90. *What to be put in issue by bill.*—In a suit for specific performance, “great accuracy of averment, and strict corresponding proof are required.”² The plaintiff should therefore set out his case with such clearness, that the court can readily see the grounds upon which he relies.³ When a waiver of objection to title is the ground relied on for specific performance, that question must be put in issue by the bill, or evidence will not be received to prove a waiver.⁴ Although the plaintiff need not state conclusions of law derived from the facts set out, yet it has been held that when the vendor intends to rely upon the waiver by the purchaser of his right to a marketable title, he must charge such waiver, and that it is not enough to allege facts. At the same time, it would be improper to aver a waiver without stating the facts.⁵ A bill seeking to enforce the specific performance of a contract for the sale of land, which shows on its face that one of the defendants through whom the plaintiff does not deduce his title, holds the legal title to the land by patent from the United States, must

¹ *Ellis v. Ellis*, 1 Dev. Eq., 398.

² *Daniel v. Collins*, 57 Ala., 625, per Stone, J.

³ *Hunter v. Daniel*, 4 Hare, 420; *Forsythe v. Clark*, 3 Wend, 657. The contract must be fully and particularly stated so that it may appear to the court to possess the elements of fairness, mutuality, and certainty; unless the complainant, being a stranger to the contract, has no full and particular knowledge of its terms, and where defects in the averments may be supplied by the proof. *Light Street Bridge Co. v. Bannon*, 47 Ind., 129.

⁴ *Page v. Greeley*, 75 Ill., 400.

⁵ *Clive v. Beaumont*, 1 De G. & S., 397; *Gaston v. Frankum*, 2 Ib., 561. The court will not set aside a decree for the specific performance of a contract of purchase on account of defects in the petition, where the jury from the evidence in the case have found a contract, and a decree has been made. *Despain v. Carter*, 21 Mo., 331.

also show that the legal title is subordinate to the equitable title under which the plaintiff claims.¹ Where suit is brought to recover damages against heirs and to enforce the specific performance of their ancestor's contract to convey, the plaintiff must aver and prove that the estate is not in process of administration, and that assets of the ancestor have come into the defendant's hands.² But a bill by the vendee of land praying a specific performance against the heirs need not allege that the vendor died seized, or that the title is in the defendants.³

§ 91. *To be shown that contract can be enforced.*—To entitle a complainant to the specific performance of a contract, it must appear that the contract can be fairly and effectually carried out.⁴ Where a bill to enforce a deed of trust showed on its face that the deed had been recorded, so as to give it priority over a docketed judgment, but the acknowledgment was not in conformity with the statute, and the bill was opposed by the judgment creditor, it was held that the court would take notice of the defect, though the objection was not taken in the answer.⁵

§ 92. *When party acted as agent.*—Where the contract sought to be enforced was made by an agent, the bill must show, either by averment, or by the contract as set out, that the person executing the same was the agent of the owner, duly authorized.⁶ But the mode of execution need not be

¹ Cameron v. Abbott, 30 Ala., 415.

² Taylor v. Rowland, 26 Texas, 293. One of the distributees of an estate assigned to the plaintiff all his interest in the undivided assets. Held, that to entitle the plaintiff to specific performance, his bill must show that such distributee, at the time of the assignment, had an interest in the undivided assets, and furnish the data from which such interest might be ascertained. Bogan v. Camp, 30 Ala., 276.

³ Moore v. Burrows, 34 Barb., 173. In Pennsylvania, by the statute of Feb. 24th, 1834, a proceeding was provided to enforce contracts made by a decedent for the sale of land, by a petition in the Orphan's Court. See Weller v. Weyman, 2 Grant Pa. Cas., 103.

⁴ May v. Fenton, 7 J. J. Marsh, 306. See *post*, Book 3, Chs. 1 & 2.

⁵ Peacock v. Tompkins, 1 Humph., 135.

⁶ Roby v. Cossitt, 78 Ill., 638; Columbine v. Chichester, 2 Phil., 27. *Contra*, Harding v. Parshall, 56 Ill., 219; Fisher v. Bowser, 41 Texas, 222.

alleged ;¹ nor the manner in which the principal ratified the agreement.²

§ 93. *Stating contract.*—The material terms of the contract sought to be enforced should be alleged.³ Where the written memorandum of a contract under which the defendants obtained money from the complainants, to be invested in land for the benefit of the latter, is lost, a bill setting out the contract, and praying specific performance, or a return of the money, and also seeking a disclosure of the contents of the memorandum, presents a case for equitable relief.⁴ When the object of the bill is to charge particular defendants, the complainant must show a case against them by proper averments. But when persons are made parties merely because they have or claim an interest in the property, it is enough for the plaintiff to show his own rights, and allege the fact that others claim an interest. The allegation that they have or claim an interest is sufficient ground for relief against them, which in such case is nothing more than asking an adjudication of such rights as they may assert.⁵ Several owners of distinct parcels of land, by one written instrument severally agreed to convey their respective lots to the same person. On a bill filed by the vendee for specific performance of the contract against one of such owners, it was held no objection that the agreement was set out as made between the complainant and the defendant.⁶ When the plaintiff alleges that the con-

¹ *Hanchett v. McQueen*, 32 Mich., 22.

² *Harding v. Parshall*, *supra*. See *Gilpin v. Watts*, 1 Col., 479. An allegation in a bill for the specific performance of an agreement to convey land, that the defendant purchased the land as the plaintiff's agent, and with his money, thus holding it in trust for the plaintiff, is not objectionable. *Gerrish v. Towne*, 3 Gray, 82.

³ *Anthony v. Leftwitch*, 3 Rand, Va., 238 ; *Gaskins v. Peebles*, 44 Texas, 390. In a suit for the specific performance of a parol agreement for the sale of land, the consideration for the agreement, the time and manner of its performance, and all of its essential terms, must be clearly and definitely alleged as well as proved. *Jones v. Jones*, 49 Texas, 683.

⁴ *Wiley v. Mullins*, 22 Ark., 294.

⁵ *Seager v. Burns*, 4 Minn., 141.

New Barbadoes Toll Bridge v. Vreeland, 4 N. J. Eq., 157.

tract was in writing, he need not aver that it was signed.¹ But it has been held that merely alleging that there was a contract, would be tantamount to averring a verbal agreement; and that where the contract is required to be in writing, unless from the rest of the pleadings a written contract must necessarily be presumed, the bill will be bad on demurrer.² It was said, however, by an eminent judge, that "if it is stated generally that an agreement or contract was made, the court will presume it a legal contract, until the contrary appears; and the defendant must either plead the fact that it was not in writing, or insist upon his defence in the answer."³

§ 94. *How land should be described.*—In a bill for the specific performance of a contract to convey, the land must be described with at least sufficient accuracy to enable the court to ascertain the property by ordering a survey.⁴ Where a widow filed a bill against her husband's devisees and representatives for the specific performance of an antenuptial agreement to settle on her "a plantation and permanent home for life," it was held that the bill must distinctly set forth what land, where situate, the number of acres, etc.⁵ A bill which alleged that the defendant promised to give a mortgage to secure notes of his due to the complainant was held too vague and indefinite, as there was no specification of the property to be mortgaged.⁶ And where the grant was described by the length of the sides

¹ *Barkworth v. Young*, 4 Drew, 1; *Field v. Hutchinson*, 1 Beav., 599; *Rist v. Hobson*, 1 Sim. & Stu., 543; 1 Danl. Ch. Pr., 4th Am. Ed., 365.

² *Barkworth v. Young*, 4 Drew, 1; *Whitechurch v. Bevis*, 2 Bro. C. C., 559; *Spurrier v. Fitzgerald*, 6 Ves., 555; *Logan v. Bond*, 13 Ib., 192; *Piercy v. Adams*, 22 Ga., 109; *Carlisle v. Brennan*, 67 Ind., 12.

³ *Chancellor Walworth*, in *Cosine v. Graham*, 2 Paige Ch., 177. See *Wildbahn v. Bobidoux*, 11 Mo., 659; *Richards v. Richards*, 9 Gray, 314; *Cranston v. Smith*, 6 R. I., 231; *Farnham v. Clements*, 51 Me., 426; *Dudley v. Bachelder*, 53 Ib., 403; *Hubbell v. Courtney*, 5 S. C., 87. Specific performance of an agreement which differs materially from the one set out in the bill, will not be decreed. *Harris v. Knickerbacker*, 5 Wend., 638.

⁴ *Gray v. Davis*, 3 J. J. Marsh, 381; *Allen v. Chambers*, 4 Ired. Eq., 125.

⁵ *Mallory v. Mallory*, 1 Busb. N. C. Eq., 80.

⁶ *Sanderson v. Stockdale*, 11 Md., 563.

and bearing trees, it was held insufficient to sustain a decree, as there was no evidence to show that the bearing trees were at the places alleged, and they constituted the controlling part of the description.¹ But a description of the land by a well-known name, in such a way as to distinguish the premises from other property, will be sufficient.² Where the plaintiff, who was an administrator, described the land to be conveyed simply "as the lot of land containing fourteen acres, more or less, which lies on the northerly side of, and adjoining the estate now or formerly owned by J. S., in the town of A.," it was held no ground for demurrer to the bill.³ Either party may plead and prove a mistake in the description of the land in a contract sought to be specifically enforced.⁴

§ 95. *Stating consideration.*—A bill filed to enforce specific performance of a written contract for the conveyance of land, in which the entire consideration is not expressed, need not set forth that part of the consideration which was omitted. In such case it is sufficient to entitle the plaintiff to maintain his suit, that he is willing and ready to pay the whole amount orally agreed upon by the parties, and has been guilty of no misconduct.⁵ Where a vendor seeks to enforce specific performance by a sale of the land and application of the proceeds to the satisfaction of the consideration, he should allege in his bill that the defendant promised or agreed to pay the consideration.⁶

§ 96. *Performance must be averred.*—The bill must show that the complainant has done everything necessary to entitle him to performance of the contract by the defendant, and that there is a demand on the other party uncomplied with.⁷ The plaintiff should allege the facts constituting

¹ Bast v. Alford, 20 Texas, 226.

² Goodenow v. Curtis, 18 Mich., 298.

³ Baker v. Hathaway, 5 Allen, 103.

⁴ Abbott v. Dunivin, 34 Mo., 148.

⁵ Park v. Johnson, 4 Allen, 259.

⁶ Capehart v. Hall, 6 West Va., 547.

⁷ Bates v. Wheeler, 2 Ill. (1 Scam.), 54; Underhill v. Allen, 18 Ark., 466; Brown v. Hayes, 33 Ga. Supp., 136; McLeroy v. Tulane, 34 Ala., 78; Bell v. Thompson, lb., 633; Columbine v. Chichester, *supra*.

performance on his part, so that the court may judge whether he has done what he ought. Therefore, a general averment that he has "done all that he was bound by the contract to do," is not sufficient;¹ nor an allegation that he has "offered, and has always been ready and willing to comply with his contract."² So, where the plaintiff alleged repeated tender of payment, and that he always had been and still was ready to pay, the bill was held objectionable for want of particularity.³ Where the vendor of land stipulated to deliver to the purchaser the patents thereof on their issue, it was held in a suit to enforce the contract of purchase that the vendor ought to aver and prove the issue of the patents not delivered.⁴ A bill for the specific performance of a contract to convey ten lots, which alleged a tender of eight whole lots, and of an equal undivided half of four other lots, was dismissed on demurrer, on the ground that it failed to show a performance on the part of the plaintiff.⁵ Where a vendee brings a suit for the specific performance of a contract for the sale of land against the vendor, the bill must allege a tender of the purchase money when it became due, a readiness to pay it at any time since, and an offer to bring the same into court.⁶ An allegation in the bill, that the defendant took possession under the contract, is equivalent to an averment that the plaintiff gave possession.⁷ Where payment of the purchase money, possession, and the making of valuable and lasting improvements by the purchaser, are relied on as grounds for the specific performance of a parol contract for the sale of land, the bill, in addition to these matters, must show that possession was taken under the contract with the knowledge and consent of the vendor, and that the purchaser is ready to pay the residue of the purchase money on obtain-

¹ Davis v. Harrison, 4 Litt., 261.

² Duff v. Fisher, 15 Cal., 375.

³ Roy v. Willink, 4 Sandf. Ch., 525.

⁷ Harris v. Knickerbocker, 5 Wend., 638.

² Hart v. McClellan, 41 Ala., 251.

⁴ Low v. Heck, 3 West Va., 680.

⁶ Bass v. Gilliland, 5 Ala., 761.

ing a decree, or receiving a deed for the land.¹ A bill for specific performance which alleged that the purchase money had all been paid, and also offered to pay whatever sum might be found due, was held sufficient, though the proof showed that part of the purchase money was still due.² Where a complainant, in a suit to enforce the specific performance of a contract in which the acts to be done by the plaintiff and defendant are mutual and concurrent, alleges an offer to perform by the plaintiff, and a refusal by the defendant, it is sufficient.³ If consent is necessary to enable the plaintiff to perform the contract, he need not allege that such consent was obtained.⁴

§ 97. *Averment of demand and refusal.*—Where a suit is brought to enforce an obligation to convey absolute on its face, and acknowledging the consideration, it is only necessary to aver a request, and a refusal to convey.⁵ The purchaser should state in his bill, that he has requested the vendor to make title, or show some excuse for not doing so. An allegation that the vendor is insolvent is not sufficient to excuse the necessity of such request.⁶ A complaint to compel the execution of a deed, alleged payment of the purchase money, and a conveyance to the defendants as

¹ Moore v. Higbee, 45 Ind., 487. Where the complainant sought to compel a conveyance on two grounds: 1st, that the deceased, whose representatives were defendants, had purchased the real estate at a sheriff's sale, and had agreed with the plaintiff, at the time of the sale, to hold the land in trust for the plaintiff; 2d, that the plaintiff had re-purchased the land from the deceased, and taken possession, agreeing to make improvements, pay taxes, and repay the purchase money, and had done acts in part performance sufficient to entitle him to a decree, it was held that although the allegation as to the trust was insufficient, yet that the facts stated warranted a decree. Pearson v. East, 36 Ind., 27. See Hauser v. Roth, 37 Ind., 89.

² Mix v. Beach, 46 Ill., 311. A bill for the specific performance of a contract to convey, which alleges a partial performance on the part of the plaintiff, need not formally allege a readiness to complete the performance. Hatcher v. Hatcher, 1 McMullan Ch., 311.

³ St. Paul Division v. Brown, 9 Minn., 157. Where the plaintiff neglects to allege that he has performed, or is willing and ready to perform, as such an omission is a mere defect in form, his bill may be amended. Chess's Appeal, 4 Pa. St., 52.

⁴ Smith v. Capron, 7 Hare, 185.

⁵ Fonnger v. Welch, 22 Texas, 417; Holman v. Criswell, 15 Ib., 394.

⁶ Carter v. Thompson, 41 Ala., 375.

security to them for a debt; that the defendants were to re-convey to the plaintiff when the debt was paid; that such payment was made, and a conveyance demanded. But the plaintiff failed to allege a refusal by the defendants to execute a deed upon demand, or at any time since; and it was held that the omission was fatal.¹

§ 98. *Charging injury*.—When damages are claimed, the particular injury must be alleged, and not merely that the plaintiff has sustained damage.² A bill to enforce the payment of a lost note must allege that the note has not been paid.³

§ 99. *Prayer for relief*.—A bill for specific performance which contains no prayer for general relief, where the whole case shown by the bill does not justify the relief prayed for, should be dismissed, although the complainant may have been entitled to some other relief.⁴ Where neither party asks for specific performance, it is error in the court to decree it.⁵

§ 100. *When cross bill required*.—In a suit for specific performance, the defendant must file a cross bill if he would have affirmative relief.⁶ Thus, upon a bill by the vendee to enforce specific performance of a contract of sale against the vendor's representatives, a balance having been found to be due the representatives, it was held that a decree could not be rendered for such sum on their answer, but that there must be a cross bill.⁷ Where, in a suit for the specific performance of a contract in regard to the sale of land, and to restrain the defendants from bringing actions on notes given for the purchase money, the defence,

¹ Dodge v. Clark, 17 Cal., 586.

² Chinock v. Marchioness of Ely, 2 H. & M., 220.

³ Mason v. Foster, 3 J. J. Marsh, 283.

⁴ Boyle v. Laird, 2 Wis., 431. A bill filed by the vendor praying for the specific performance of the contract of sale, or that all claim of the vendee be foreclosed, is not a bill to foreclose a mortgage. State of Conn. v. Sheridan, 1 Clark N. Y., 533.

⁵ Cantrell v. Rice, 6 J. J. Marsh, 338.

⁶ Hanna v. Ratikin, 43 Ill., 103.

⁷ Bussey v. Gant, 10 Humph., 238.

which was established, was, in substance, that the defendants were not bound to complete until the notes were paid, it was held that no other judgment could be rendered than one dismissing the complaint; and a judgment giving the defendants affirmative relief, was reversed.¹ But if the answer admits the agreement as alleged in the bill, the court may decree performance by both parties, without a cross bill.² Where the purchaser files a bill for performance after the time fixed in the contract, the vendor may, by answer, submit to perform, and file a cross bill, and compel the purchaser also to perform. But he cannot resist fulfilment, and after the property has depreciated in value, enforce specific performance against the purchaser.³ The only real difference between a bill and a cross bill is, that the first is filed by the plaintiff, and the second by the defendant. Both contain a statement of the facts, and each demands affirmative relief upon the facts stated. In the making up of the issues and the trial of questions of fact the court is governed by the same principles of law and rules of practice in the one case as in the other. When a defendant files a cross bill and seeks affirmative relief he becomes the plaintiff, and the plaintiff in the original action becomes the defendant in the cross bill.⁴

¹ *Wright v. Delafield*, 25 N. Y., 266. ² *Dorsey v. Campbell*, 1 Bland Ch., 356.

³ *Tobey v. Foreman*, 79 Ill., 489. A cross bill makes, with the original bill, but one suit, and, when the latter is dismissed, the dismissal carries with it the dismissal of the cross bill. *Elderkin v. Fitch*, 2 Carter, 90. As the cross bill is a matter of defence, it ought not to introduce anything not contained in the original suit. *May v. Armstrong*, 3 J. J. Marsh, 262; *Daniel v. Morrison*, 6 Dana, 186; *Fletcher v. Wilson*, 1 Sm. and Marsh Ch., 376; *Galatian v. Erwin*, Hopk. Ch., 48; *S. C. 8*, Cowen, 361; *Josey v. Rogers*, 13 Ga., 478; *Slason v. Wright*, 14 Vt., 208; *Rutland v. Paige*, 24 Ib., 181; *Draper v. Gordon*, 4 Sandf. Ch., 210. But a cross bill is not restricted to the issues of the original suit. *Nelson v. Dunn*, 15 Ala., 501. It may set up additional facts when they constitute part of the same defence, relative to the same subject matter. *Underhill v. Van Cortlandt*, 2 Johns. Ch., 339, 355. It is not a good objection to a cross bill that it does not set out a copy of the written obligation on which the claim is based, when the obligation is attached in full to the plaintiff's bill. *Coe v. Lindley*, 32 Iowa, 437. Under the system of pleading adopted by the codes, the equitable counter-claim may take the place of a cross bill or complaint. See *McAbee v. Randall*, 41 Cal., 136.

⁴ *Ewing v. Patterson*, 35 Ind., 326.

§ 101. *Amendment by plaintiff when contract different from that charged.*—Where an answer to a bill for specific performance sets up a contract different from that charged in the bill, the plaintiff cannot have a decree for the performance of such contract without amending his bill so as to insist upon it.¹ An obligee in a bond to make title, filed a bill for specific performance of the contract and claimed to have the land conveyed according to certain boundaries, which he averred were intended by the parties. The defendant denied that such boundaries were meant, and set out others, which he alleged were the true ones. Held, that the plaintiff was not entitled to a decree corresponding with the defendant's allegations, for the reason that he had not averred his willingness to accept a deed according to the lines as set out by the defendant, and had not offered to release him from any further claim.² But where, in a suit for the specific performance of a written contract, the defendant in his answer submitted to a specific performance of the real agreement, it was held that if the defendant established his case by evidence, he was entitled to specific performance of the agreement as proved, even against the claim of the plaintiff to have his bill dismissed.³

§ 102. *Demurrer to bill objecting statute of frauds.*—The want of an agreement within the statute, when shown by the bill, may be objected by general demurrer,⁴ or by a demurrer alleging the want of such an agreement;⁵ it be-

¹ *Byrne v. Romaine*, 2 Edw. Ch., 445. To a bill for specific performance, the defendant pleaded that the contract alleged by the plaintiffs did not contain the true terms of purchase, but he did not state what the true terms were. The defendant afterward produced a contract for purchase containing different terms from those alleged by the plaintiffs. The plaintiffs amended their statement of claim, but continued to insist upon specific performance of the contract as stated by them. It was held that the plaintiffs asking at the trial to have specific performance with a variation, according to the terms of the agreement produced by the defendant, the suit would not be dismissed, but that judgment would be given for specific performance with the variation. *Smith v. Wheatcroft*, L. R. 9, Ch. D., 223.

² *Richardson v. Godwin*, 6 Jones, Eq., 229.

³ *Bradford v. Union Bank of Tennessee*, 13 How., 57.

⁴ *Field v. Hutchinson*, 1 Beav., 599.

⁵ *Wood v. Midgley*, 5 De G. M. & G., 41; S. C. 2, Sm. & Gif., 115; *Barkworth v. Young*, 4 Drew, 1; and see *Howard v. Okeover*, 3 Swanst., 421, n.

ing incumbent on the plaintiff to state the facts, if any, which take the case out of the statute. The statute of frauds differs in this respect from the statute of limitations, which must, in all cases, be pleaded.¹

§ 103. *Setting up statute of frauds by plea or answer.*—If specific performance be sought of a parol contract, and the defendant, who desires to avoid such performance on the ground that the contract is within the statute of frauds, does not demur, he must raise the objection by plea or answer; otherwise he will be deemed to have waived it.² Where, in a suit for the specific performance of a contract to convey real estate, the complaint showed that the agreement to convey was not in writing, and did not aver that possession of the land was given under the contract, it was held that a general denial did not raise the issue of the statute of frauds.³ Where, however, a bill alleged a parol agreement and part performance, a plea averring that there was no agreement in writing, and an answer insisting that the alleged acts did not amount to part performance, was held sufficient.⁴ But a plea in bar alone to such a bill would be multifarious and bad, for the reason that it would consist of two distinct points, viz., a denial of any written agreement, and of the acts of part performance.⁵ Although, when the answer denies or does not admit the agreement, the defendant is not called upon to plead the statute in

¹ *Ridgway v. Wharton*, 3 DeG. M. & G., 691. Where a petition sets forth facts which would take the case out of the statute of limitations, the defendant cannot plead the statute unless he denies the averments in the petition, and the issues of fact thus presented must be tried. *Wright v. Le Clair*, 4 Greene, Iowa, 420.

² *Adams v. Patrick*, 30 Vt., 576; *Hull v. Peer*, 27 Ill., 312; *Meach v. Perry*, 1 D. Chip Vt., 182; *Deyer v. Martin*, 4 Scam., 146; *Hollingshead v. McKenzie*, 8 Ga., 457. A decree for the specific performance by infant heirs of a parol contract of their ancestor was reversed on appeal, on the ground that the neglect of the guardian to plead the statute of frauds in defence should not prejudice the rights of the infants. *Grant v. Craigmiles*, 1 Bibb., 203.

³ *Livesey v. Livesey*, 30 Ind., 398.

⁴ *Whitechurch v. Bevis*, 2 Bro. C. C., 559; *S. C.* 2, Dick, 664; and see *Hosier v. Read*, 9 Mod., 86; *Moore v. Edwards*, 4 Ves., 23; *Bowers v. Cator*, *Ib.*, 91; *Evans v. Harris*, 2 V. & B., 361.

⁵ *Whitebread v. Brockhurst*, 1 Bro. C. C., 404; and see *Child v. Comber*, 3 Swanst., 423, n.

order to avail himself of it as a defence, as the burden of proof is then on the plaintiff to show a valid agreement capable of being enforced; yet, if the answer admit an agreement, even though it be but a parol one, the defendant must plead the statute in order to avail himself of it.¹ In an action for the specific performance of a parol contract to convey to the mortgagor premises sold under a decree of foreclosure, the defendant denied the agreement set out in the complaint, and set up an agreement to re-convey upon different terms and conditions. Held, that the contract so set up in the answer could not be held sufficient to take the case out of the statute of frauds, because it did not correspond with that alleged in the complaint.² It is well settled that the defendant is entitled to the full benefit of the statute, notwithstanding his admission that there was an agreement;³ but if he desires to claim the benefit of the statute, he must do so distinctly at the same time that he admits the agreement.⁴ If this be neglected, it cannot be done at the hearing.⁵ Where the defendant stated in his answer that no formal note of the agreement was made, and that no binding agreement ever existed, without expressly claiming the benefit of the statute, it was held that he could

¹ *Ridgway v. Wharton*, 3 De G. M. & G., 677; S. C. 6, House of Lords, 238; *Croyston v. Banes*, Prec. Ch., 208; *Symondson v. Tweed*, Ib., 374; *Irildbahn v. Robidoux*, 11 Mo., 659; *Walker v. Hill*, 21 N. J. Eq., 191; *Albert v. Winn*, 5 Md., 66; *Talbot v. Bowen*, 1 A. K. Marsh, 436; *Small v. Owings*, 1 Md. Ch., 363; *Artz v. Grove*, 1 Md., 456; *Newton v. Swasey*, 8 N. H., 9; *Tilton v. Tilton*, 9 N. H., 385; *Dean v. Dean*, 9 N. J. Eq., 425; *Smith v. Brailsford*, 1 Desaus., Eq., 350; *Hutchinson v. Hutchinson*, 4 Ib., 77. The complainant in a bill for the specific performance of a parol contract to convey land, and in the alternative for compensation for improvements, is not entitled to the relief sought, where the answer denies the terms of the contract as set out in the bill, alleges a different contract, and also insists on the statute of frauds. *Sain v. Dulin*, 6 Jones, Eq., 195.

² *Morrell v. Cooper*, 65 Barb., 51.

³ *Cooth v. Jackson*, 6 Ves., 12; *Moore v. Edwards*, 4 Ib., 23; *Rowe v. Teed*, 15 Ib., 375; *Blagden v. Bradbear*, 2 Ib., 466; *Whitbread, ex parte*, 19 Ib., 212. An answer to a bill for the specific performance of a contract of sale, admitting that "the defendant negotiated to and with the plaintiff for a sale of the lot for seven hundred dollars, but denying that the defendant did sell the same," was held not to admit the contract. *Auter v. Miller*, 18 Iowa, 405.

⁴ *Spurrier v. Fitzgerald*, 6 Ves., 548; *Beatson v. Nicholson*, 6 Jur., 621.

⁵ *Baskett v. Cafe*, 4 De G. & Sm., 388.

not avail himself of it.¹ The defendant need not claim the benefit in the very words of the statute, "but he must claim it in words equivalent, so as to call the attention of the plaintiff to the circumstance that the benefit of the statute is claimed."²

§ 104. *Objecting that wife did not unite in contract.*—Where, in a suit for the specific performance of a contract to convey land, the defendant wishes to avail himself of the defence that the land is his homestead; that he is a married man, and that his wife did not join in the contract, those facts must be set up in the pleading, and cannot be proved under a mere denial of the agreement.³ The defence to a bill by the vendee for specific performance that the wife refuses to release her dower, will not avail if the vendee offers to waive the release.⁴

§ 105. *Averment in answer of new matter.*—If new matter be set up, not responsive to the allegations of the bill, or not supported by the proof, it is no ground for denying the relief prayed for; as where the vendor admitted his failure to convey on demand, and claimed the balance of the purchase money agreed on, and also the discharge of an old debt of the vendee's father, which was alleged to be a lien on the land, before he was willing to execute a deed.⁵ In a suit by a vendee to compel specific performance of an agreement to sell and convey land, and take a mortgage thereon to secure a part of the purchase money, it is no defence that the use of the land contemplated by the vendee would destroy its value, within the time allowed by the mortgage, and that the plaintiff was so heavily in debt that

¹ Skinner v. M'Douall, 2 De G. & Sm., 265.

² Wigram, Vice-Chancellor, in Beatson v. Nicholson, *supra*. An objection that the contract is void for uncertainty may be taken by answer instead of demurrer. Pearce v. Watts, L. R. 20, Eq. 492.

³ Brown v. Eaton, 21 Minn., 409.

⁴ Corson v. Mulrany, 49 Pa. St., 88.

⁵ Smoot v. Rea, 19 Md., 398. A bill was filed to enforce specific performance of a contract to convey land to two. The answer alleged a tender to one, and a demand of payment of the consideration note, which was refused. Held that such answer was sufficient, the other plaintiff being out of the country. Lane v. Ready, 12 Ind., 475.

the mortgage would be the only security for the purchase money.¹ And where a defendant, in his answer, set up an outstanding right to the premises in a third party, who acquiesced in the plaintiff's title, it was held not a defence to the bill.²

¹ Corson v. Mulrany, *supra*.

² Lavery v. Moore, 33 N. Y., 658. In a suit to enforce the specific performance of an agreement for the exchange of lands, the plaintiff being unable to give the title mentioned in the agreement, it was held that the bill might be dismissed, although the objection was not stated in the answer, or taken until the hearing before the referee. Park v. Johnson, 7 Allen, 378.

CHAPTER III.

INJUNCTION.

106. Preservation of rights pending suit.
107. Where a party is proceeding to enforce a judgment contrary to agreement.
108. Restraining action at law in relation to subject of suit.
109. Where party is proceeding to act contrary to agreement.
110. To compel party to fulfil agreement.
111. In case of breach of articles of partnership.
112. Where affirmative covenant involves a negative.
113. In case of affirmative and negative stipulations.
114. Where the agreement is not to do a certain thing.
115. In case of violation of covenant as to the use of land sold.
116. Where party agrees not to apply to the Legislature.
117. In case of contracts for personal services.

§ 106. *To restrain threatened injury until after hearing.*—An injunction may be a mode of specifically performing the contract; or it may be incident and ancillary to the performance. It will only be granted to the extent that the plaintiff establishes a case for protection, and will not be extended to restrain breaches in relation to which a necessity for relief is not shown.¹ But it is sufficient that the plaintiff make out a *prima facie* case, though his title to the relief prayed for ultimately fail.² Where the legal title to the subject matter of the contract remains in one of the parties, while an equitable right passes to the other, the court, unless the party having the equitable right has so conducted as to deprive himself of his equity, will, as a rule, restrain the party in possession of the legal title from proceeding upon it at law to disturb the other party in the enjoyment of the thing bargained for, at least until the hearing.³ “The court will, in many cases, interfere, and preserve

¹ Earl of Mexborough v. Bower, 7 Beav., 127.

² Powell v. Lloyd, 1 Y. and J., 427.

³ Shannon v. Bradstreet, 1 Sch. and Lef., 52; Green v. Green, 2 Mer., 86. Where the evidence of the title of a party has been lost, through accident, the other party will be restrained by an injunction from setting up his title. Butch v. Lash, 4 Iowa, 215.

the property *in statu quo* during the pendency of a suit in which the rights in relation to it are to be decided; and that without expressing, and often without the means of forming, an opinion as to such rights.”¹ And the injunction will be continued, although it be not clear that the plaintiff will succeed at the hearing, provided there is ground for supposing that relief may be given.² Where a lessee filed a bill against his lessor, for the specific performance of an agreement to grant a lease, the lessor was restrained from bringing an action of ejectment during the suit.³ But if, in a suit by a tenant for specific performance, it is doubtful whether a decree can be rendered in his favor, the court will either decline to enjoin the landlord from pursuing his legal right; or, if it grant an injunction, will impose such terms on the tenant as will secure to the landlord, in case it appears at the hearing that the tenant is not entitled to specific performance, the same benefit he would have had if the injunction had not been granted.⁴ An injunction was refused in behalf of a tenant, on the ground that he was insolvent, and had injured the premises.⁵ But a landlord was restrained from bringing ejectment, notwithstanding the person with whom he contracted was bankrupt, and had

¹ Lord Cottenham in *Gt. Western R.R. Co. v. Birmingham & Oxford Junc. R.R. Co.*, 2 Phil., 605.

² *Hudson v. Bartram*, 3 Mad., 440.

³ *Boardman v. Mostyn*, 6 Ves., 467. Where a lessee, in consequence of bad weather, was unable to complete repairs within the time allotted, and the lessor did not notify him that the repairs should be expedited, an action of ejectment was restrained by injunction. *Bargent v. Thompson*, 4 Giff., 475. See *Bamford v. Creasy*, 3 Ib., 675.

⁴ *Attwood v. Barham*, 2 Russ., 186; *Sanxter v. Foster*, Cr. & Ph., 302; *Pyke v. Northwood*, 1 Beav., 152; *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Sm. & G., 120.

⁵ *Buckland v. Hall*, 8 Ves., 92. Where the owner of land, taken by a railroad company, brought a suit against the company to enforce his lien for the unpaid purchase money, it was held that the court would not grant an injunction or a receiver against the company before judgment was obtained, even though the company admitted their liability. *Latimer v. Aylesbury & Buckingham R.R. Co.*, L. R. 9, Ch. D. 385. In a suit by a vendor against a railway company to enforce his lien for the purchase money, interest, and costs, and to restrain the company from running trains across the land, the court made an order for a sale of the land, but declined to grant an injunction. *Licett v. Stafford & Uttoxeter R.R. Co.*, 13 L. R., Eq. 261.

assigned the benefit of the agreement to another; the assignee being solvent, and in a condition to enter into the usual covenants, and there being nothing to show that the contract was entered into upon considerations personal to the assignor.¹ An injunction will be granted to restrain a vendor from conveying the legal title to real estate pending a suit for the specific performance of a contract for its sale, which, if permitted, might compel the vendee to make some other person a party to the suit.² But a vendor will not be entitled to a bill in equity to prevent his purchaser from buying other land from a third person pending the transaction, on the ground that by making such second purchase, it may be impossible for him to complete the first.³ A purchaser who had obtained possession was enjoined from cutting timber on the land.⁴ And third persons will sometimes be restrained from proceeding to do what would prejudice the plaintiff in relation to the property.⁵ An improper disposition of trust assets may be restrained in behalf of the *cestui que trust*; or a threatened breach of trust prevented on the application of a co-trustee;⁶ or an

¹ Crosbie v. Tooke, 1 M. & K., 431.

² Echcliff v. Baldwin, 16 Ves., 267; Curtis v. Marquis of Buckingham, 3 V. & B., 168. "If the validity of the contract is open to doubt, the question whether the vendor shall be permitted to transfer the legal estate to a third person pending a suit for specific performance, becomes a question of comparative convenience or inconvenience. If, on the one hand, greater inconvenience would arise to the plaintiff from withholding the injunction, than to the defendant from granting it, an injunction will be granted." Kerr on Injunc., 336. An injunction will be granted with caution. In one case the court refused to restrain a vendor from leasing the property, and from selling and conveying the same, except to the plaintiff, on the ground that a purchaser, pending the suit, would take subject to the rights of the plaintiff. Turner v. Wright, 4 Beav., 40. In another case, Lord Eldon, though he granted an injunction restraining the vendors of certain copyhold property from surrendering it to any other persons than the plaintiffs, who were in possession and had paid part of the purchase money, said: "I wish it understood, as my opinion, that, in general, on a bill for the specific performance of an agreement to sell, the plaintiff is not entitled to restrain the owner from dealing with the property. A different doctrine would operate to control the rights of ownership, although the agreement was such as could not be performed." Spiller v. Spiller, 3 Swanst., 556.

³ Syers v. Brighton Brewery Co., 13 W. R., 220.

⁴ Crockford v. Alexander, 15 Ves., 138. ⁵ Nicholson v. Knapp, 9 Sim., 326.

⁶ Scott v. Becher, 4 Price, 346; Kerr on Injunc., 172, 173.

injunction be issued against executors, when they are mismanaging the assets of the estate.

§ 107. *To prevent party from enforcing a judgment contrary to agreement.*—The enforcement of a judgment, entered contrary to an express agreement between the parties, may be restrained by injunction.¹ Upon a bill praying that the defendant might be restrained from enforcing a judgment at law obtained in violation of an agreement that the case should be discontinued without costs, it was held that the fact that the defendant had not threatened to enforce the judgment, was no reason for refusing the relief asked for; since it was indispensable to the plaintiff's security, that the judgment against him should be discharged, or put in such a condition that it could never subject him to the danger of further litigation, and that the refusal of the defendant to discharge the judgment, was tantamount to a threat to enforce it;² and where a judgment creditor was proceeding to collect the whole amount of the judgment, contrary to an agreement between the parties that certain payments should be credited thereon, a decree was rendered enjoining so much of the judgment as was equivalent to the amount agreed to be credited.³ So, where several judgment creditors, who have levied on real estate, enter into an agreement that the land shall be sold on one of the judgments, that "upon such a sale, a clear title shall pass to the purchaser, and that the priorities of the liens under the several judgments and levies shall be tried in such mode as may be thought advisable, and the proceeds of sale appropriated accordingly," a violation of the agreement will be restrained by injunction.⁴

¹ Kent v. Ricards, 3 Md. Ch., 392. A court of equity will not restrain the execution of a judgment, unless the complainant had a good defence at law, and was prevented from availing himself of it by mistake, surprise, or fraud, without any fault or negligence of his. Hill v. Reifsnider, 46 Md., 555.

² Chambers v. Robbins, 28 Conn., 552.

³ Newman v. Meek, Sm. and Marsh Ch., 331; and see Dickenson v. McDermott, 13 Texas, 248.

⁴ Reily v. Miami Exporting Co., 5 Ohio, 333.

§ 108. *Enjoining action at law in relation to same matter.*—Upon the principle that equity will not permit an action at law to be maintained in respect to the same subject matter, the court will, in general, after a bill for specific performance has been filed, restrain an action for damages for delay in completion, or an action for the deposit upon its being paid into court;¹ and an injunction to restrain an action at law for the deposit, may be obtained in behalf of, or against, the agent of a party. An injunction was granted against the purchaser, restraining him from proceeding in an action against the auctioneer, who was not a party; though, in a previous case, a motion for an injunction against the purchaser, forbidding him to proceed at law to recover the deposit from the seller's attorney who was not a party, was denied with costs.² When the vendor retains both the deposit and the land, through the fault of the purchaser, he will not be compelled to pay the deposit into court.³

§ 109. *To prevent the doing of some act in violation of agreement.*—An injunction frequently takes the form of a decree for specific performance by restraining a party from doing a certain act, which, by the terms of the contract, either express or implied, he is required not to do.⁴ Where

¹ Levy v. Lindo, 3 Mer., 82; Johnson v. Smart, 2 Giff., 156; Kell v. Nokes, 32 L. J. Ch., 785; Duke of Beaufort v. Glynn, 3 Sm. and G., 213; Annesley v. Muggridge, 1 Mad., 593; Fordyce v. Ford, 4 Bro. C. C., 494. If a party, pending a suit to establish his legal title, obtains possession of the property by unfair means, equity will not stay proceedings at law against him for the recovery of possession. Grafton v. —, 1 R. and M., 336.

Although the dismissal of the vendor's bill for specific performance, will not, as a rule, prevent his bringing an action for breach of the contract, yet it is customary to state in the decree, that the dismissal is without prejudice to the legal right. Macnamara v. Arthur, 2 B. and B., 349. But an action at law will be enjoined where the bill has been dismissed for want of title, *Ib.*; or where the doing of the thing for which the action at law is brought, has been waived. Reynolds v. Nelson, 6 Mad., 290. If specific performance be decreed, proceedings at law will be restrained. Green v. Low, 22 Beav., 625; Frank v. Basnett, 2 M. and K., 618; Prothero v. Phelps, 7 D. M. and G., 734.

² Sug. V. and P., 229, *n.*

³ Wynne v. Griffith, 1 Sim. and Stu., 147. See Lloyd v. Collett, 4 Bro. C. C., 469, *n.*; Stewart v. Alliston, 1 Mer., 28; Tanner v. Smith, 4 Jur., 310; Pincke v. Curteis, 4 Bro. C. C., 330; Morley v. Cook, 2 Hare, 106.

⁴ Barret v. Blgrave, 5 Ves., 555. As a rule, the violation of a contract which cannot be specifically enforced will not be restrained by injunction. Accordingly, where the lessee of a coal mine contracted to raise and deliver to the

a contract was entered into between two companies whereby one was to construct a railroad, and the other to operate it and to carry over the line certain traffic, and the latter company was violating the agreement by carrying the traffic over other lines, a demurrer to a bill filed by the first-named company to restrain the other from so doing, was overruled.¹ If a stipulation is violated, the plaintiff may be restrained whether damage will or will not otherwise be likely to result. "If the construction of the instrument is clear, then it is not a question of damage; but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere by injunction."² But although the simple fact that there has been a breach of covenant is sufficient, and it will be no answer for the defendant to say that the act complained of will inflict no injury on the plaintiff, or will be a benefit to him; yet if damages will compensate either the benefit derived or the loss suffered, equity will not interfere. So, where either party may suffer by the granting or withholding of an injunction, the

plaintiffs all the coal in the mine at a fixed price for five years, and, coal having risen in value, the defendant was selling coal to other parties, it was held on demurrer that the court had no jurisdiction to grant an injunction to restrain a breach of the contract. *Fothergill v. Rowland*, L. R. 17, Eq. 132. But if the case is one in which the granting of an injunction will do substantial justice between the parties by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce specific performance of it. "It was formerly thought that an injunction would not be granted to restrain the breach of any contract, unless the contract was of such a character that the court could fully enforce the performance of it on both sides. Upon this ground there were many decisions refusing to interfere with contracts for personal services, however flagrant might be the breach of them. . . . It is now firmly established that the court will often interfere by injunction when it cannot decree specific performance. . . . The case of *Lumley v. Wagner*, 1 De G. M. & G., has been followed by numerous cases concerning actors, authors, and publishers. *Webster v. Dillon*, 5 W. R., 867; *Stiff v. Cassell*, 5 Jur. N. S., 348. The case of *Fechter v. Montgomery*, 33 Beav., 22, sometimes cited as opposed to these decisions, is not so at all. The decision there was that the actor had the right to renounce his engagement because the manager had not fulfilled his part of the contract. See also *Slee v. Bradford*, 4 Giff., 262." *Lowell, J., Singer Co. v. Union Co.*, 1 Holmes C. C., 253.

¹ *Wolverhampton & Walsall R.R. Co. v. London & Northwestern R.R. Co.*, L. R. 16, Eq. 433.

² Vice-Chancellor Wood in *Tipping v. Eckersley*, 2 K. & J., 270. Approved in *Lord Mannors v. Johnson*, 44 L. J. C., 404.

rule in equity requires the court to balance the inconveniences likely to be sustained by the respective parties by means of the action of the court, and to grant or withhold the injunction according to sound discretion.¹ The violation of a contract may be restrained by injunction though one party has the sole right to terminate it, provided their stipulation is not one that makes the whole contract inequitable.² Where the plaintiff might discontinue his business whenever he chose, and thereby deprive the defendant of employment, the latter was nevertheless restrained from working for another person.³ In case of an agreement to sell and deliver goods, the seller will not in general be restrained from making a different disposition of the goods, for the reason that the breach of the contract can be compensated by the market value of the goods.⁴ Where the acts complained of are repeated, and it cannot be ascertained in each case whether there has been a breach without an action at law, an injunction will not be granted.⁵ When there is a dispute relative to the rights of the parties under the contract involving its terms and obligations, an injunction ought not to be granted until the rights of the parties are ascertained and settled. If the proof be so equally balanced as to leave the precise terms of the contract in doubt, this will be sufficient cause for a denial of the application.⁶

§ 110. *To compel fulfilment of stipulation.*—The jurisdiction of equity to interfere by way of injunction is not confined to cases in which specific performance can be decreed, but is exercised whenever it can operate to bind men's consciences to a true and literal fulfilment of their agreement. If the injury done to the plaintiff cannot be estimated, and

¹ Grey v. Ohio & Pa. R.R. Co., 1 Grant, 412; Richard's Appeal, 57 Pa. St., 105.

² Singer Co. v. Union Co., 1 Holmes C. C., 253.

³ Rolfe v. Rolfe, 15 Sim., 88.

⁴ Fothergill v. Rowland, L. R. 17, Eq. 132. See *ante*, §§ 16, 17.

⁵ Collins v. Plumb, 16 Ves., 454.

⁶ Brown's Appeal, 62 Pa. St., 17.

sufficiently compensated in money, the court has power to grant what is called a mandatory injunction; that is, an order compelling the defendant to restore things to the condition which they were in, previous to the wrong, and, in that way, indirectly enforce an agreement of which it could not directly decree specific performance.¹ Where, for instance, the lessor of mills covenanted to supply water to them from certain canals and reservoirs, and the lessee filed a bill to compel the lessor to repair the canals so that the lessee could enjoy the water, Lord Eldon, doubting whether he could decree repairs, accomplished the same result by enjoining the lessor from hindering the plaintiff's enjoyment of his rights by keeping the canals out of repair.²

¹ *Isenberg v. East India House Co.*, 33 L. J. Ch., 392; *Stanley v. Earl of Shrewsbury*, L. R. 19, Eq. 619.

² *Lane v. Newdigate*, 10 Ves., 192. This is said to have been the first case in which the application of the negative form of injunction to insure the performance of a positive agreement, was distinctly avowed by the court. *Batten on Specif. Perform.*, 140. The bill prayed that the defendant might be decreed to restore a cut for carrying waste water, and to restore a stop-gate, and the banks of a canal to their former height; and also to repair such stop-gates, bridges, canals, and towing paths, as were made previously to the granting of the lease. Lord Eldon, after expressing a doubt whether it was according to the practice of the court to order repairs, said: "As to restoring the stop-gate, the same difficulty occurs. The question is, whether the court can specifically order that to be restored. I think I can direct in terms that which will have that effect. The injunction I shall order, will create the necessity of restoring the stop-gate; and attention will be had to the manner he is to use these locks, and he will find it difficult, I apprehend, to avoid completely repairing these works." The order restrained the defendant from hindering the plaintiff from using the canal contrary to the covenant, by continuing to keep the said canal, or the banks, gates, locks, or works of the same, respectively, out of good repair, or by continuing the removal of the stop-gate.

The practice of granting mandatory injunctions was disapproved by Lord Brougham, as being a circuitous way of obtaining the object sought. In *Rankin v. Huskisson*, 4 Sim., 18, after referring to the cases, he said: "This brings me to *Lane v. Newdigate*, which may be said to go to the very uttermost verge of all the former cases, and indirectly to order something to be done, by restraining the party from continuing to keep certain works out of repair. That case appears to have been *ex parte*, and not at all argued." And in a subsequent case, he said: "I shall pursue the course I have always taken, of not extending the power which, in cases of a peculiar nature, this court has sometimes exercised, of ordering a thing to be done, under the form of restraining parties from preventing it." *Milligan v. Mitchell*, 1 M. & K., 452.

In a suit against a railroad company, the bill prayed that the defendants might be restrained from stopping up a road which they had already stopped up. Sir L. Shadwell, Vice-Chancellor, in overruling a demurrer, said: "The power of the court to grant that species of injunction, which Lord Eldon granted, namely, restraining a party from allowing a thing to continue, and which has the effect of making him take some active measures, has been since recognized and acted

And the same judge, in another case, enforced an agreement for a right of way by an injunction restraining the removal of the materials and the destruction of the way.¹

§ III. *In case of violation of articles of partnership.*—A court of equity will restrain by injunction a member of a firm from a breach of the partnership articles, or from excluding the other partner from the business of the concern, or so conducting that the partnership cannot go on with advantage, and if necessary a receiver will be appointed. And the same thing will be done under similar circumstances with regard to public companies.² Where a partnership had been formed for a specified time which had not expired, a partner, who insisted on a dissolution and formed another partnership, was restrained from carrying on business with any other persons until the expiration of the term; and his new partners were restrained from carrying on business with him, or otherwise, in the name of the old firm, and from receiving or opening letters addressed to it, and from interfering with its property. The partner who had left, was also restrained from publishing or circulating any notice of the dissolution of the old firm before the expiration of the time for which it had been formed.³ So, one of the proprietors of a morning newspaper obtained

on; and I don't see why, if that species of negative injunction has been adopted, it should not be adopted here, so as to prevent the parties from continuing the excavation in its present state, and from making the excavation greater. The injunction asked for, so far as it restrains the defendants from widening the excavation, is quite the common sort; but so far as it seeks to prevent its continuance, it is of a negative kind; but it has been adopted by Lord Eldon." *Spencer v. London & Birmingham R.R. Co.*, 8 Sim., 193.

It was said by the court in one case, "that injunctions, in substance mandatory, though in fact merely prohibitory, have been, and may be granted by the court, is clear. This branch of its jurisdiction may be one not fit to be exercised without particular caution; but certainly it is one fit and necessary, under certain circumstances, to be exercised. Under what circumstances it should be exercised, must be a matter for judicial discretion in each case." *Bruce v. C. in Gt. North of Eng. R.R. v. Clarence R.R.*, 1 Coll., 522.

In this country, the courts grant mandatory injunctions with great reluctance. *Washington University v. Green*, 1 Md. Ch., 97; *Audenreid v. Phila. & Reading R.R. Co.*, 68 Pa. St., 370.

¹ *Newmarch v. Brandling*, 3 Swanst., 99.

² *Featherstone v. Cooke*, L. R. 16, Eq. 298.

³ *England v. Curling*, 8 Beav., 129.

an injunction against his co-partners, who were also proprietors of another newspaper in which he was not interested, restraining them from publishing in the latter, information obtained at the expense of the former, until after it had been published in the former.¹ And one of the proprietors of a theatre was restrained from violating the partnership articles, by writing plays for other theatres.²

§ 112. *Where contract involves a negative.*—When an affirmative covenant also involves a negative, equity will restrain the doing of acts inconsistent with the agreement. A person who, having covenanted to leave sufficient barriers against adjoining collieries, had not done so, was enjoined from permitting the communications to remain open.³ One who had covenanted to preserve trees from waste and damage, was restrained from cutting them down, or injuring them.⁴ So, lessees who have covenanted to cultivate land in a husbandlike manner, or according to the custom of the country, have been restrained from doing the contrary.⁵ And where an actor contracted to perform at a certain theatre, he was restrained from performing elsewhere on the nights he had engaged to perform at the plaintiff's theatre, although he did not agree not to perform at any other place.⁶ So, a lessee who has covenanted to deliver up the premises at the end of the term in good repair, may be restrained during the term from pulling down

¹ *Glassington v. Thwaites*, 1 Sim. & Stu., 124.

² *Morris v. Coleman*, 18 Ves., 437.

³ *Earl of Mexborough v. Bower*, 7 Beav., 127.

⁴ *Lord Bathurst v. Burden*, 2 Bro. C. C., 64.

⁵ *Drury v. Molins*, 6 Ves., 328; *Pratt v. Brett*, 2 Mad., 62; *Kimpton v. Eve*, 2 V. & B., 349; *Walton v. Johnson*, 15 Sim., 352; *Webb v. Plummer*, 2 B. & Ald., 746; *Rogers v. Price*, 13 Jur., 820.

⁶ *Webster v. Dillon*, 3 Jur. N. S., 432. See *post*, § 117. Where a husband and wife entered into an agreement with the manager of a theatre, that the wife should act therein for a specified time, for a certain salary, it was held that the wife would not be enjoined from performing at another theatre during the time; nor the husband from allowing her to change her residence; nor another manager from employing her within the time. *Burton v. Marshall*, 4 Gill, 487. The court in this case remarked that the agreement contained no negative stipulation.

the house, and carrying away the materials.¹ An injunction was granted against a railroad company, restraining it from removing from the cars placards and advertisements, and from the stations the book-stalls of the plaintiff, in breach of a covenant.² And where a member of a partnership carried off a book of the firm, in violation of the deed of partnership, he was made to perform his covenant by means of an injunction.³

§ 113. *Where the contract is both affirmative and negative.*—When an affirmative agreement is such that it cannot be specifically enforced, and the effect of an injunction would be to decree specific performance, the court will not import a negative covenant into the agreement, but will leave the plaintiff to his remedy at law. Thus, where the plaintiff is granted an office or situation of trust and confidence, the defendant will not be restrained from employing another person in the plaintiff's place.⁴ So where there was a contract for exclusive service during seven years, and for a partnership at the expiration of that time on such terms as should be mutually agreed on, as the court could not enforce the whole agreement, it refused to restrain the violation of the covenant for exclusive service.⁵ And where a contract was entered into between A. and B., that the former should furnish the latter drawings for maps, which B. should have the exclusive right to sell, as the court could not compel A. to furnish the drawings, it refused to restrain B. from selling the maps.⁶ If, however,

¹ See *Ward v. Duke of Buckingham*, cited, 10 Ves., 161.

² *Holmes v. Eastern Counties R.R. Co.*, 3 K. & J., 675.

³ *Taylor v. Davis*, 3 Beav., 388, n.

⁴ *Pollard v. Clayton*, 1 K. & J., 462; *Peto v. Brighton, etc., R.R. Co.*, 1 H. & M., 468; *De Mattos v. Gibson*, 4 De G. & J., 299; *Newberry v. James*, 2 Mer., 446; *Hamilton v. Dunsford*, 6 Ir. Ch., 412. A contract of charter party is an exception to the rule that a negative will not be imported into an affirmative agreement unless the agreement is such that a decree for specific performance can be rendered. *Kerr on Injunc.*, 526.

⁵ *Kimberley v. Jennings*, 6 Sim., 340.

⁶ *Baldwin v. Soc. for Diffusing Useful Knowledge*, 9 Sim., 393; *Clarke v. Price*, 2 J. Wils., 157.

the agreement consists of affirmative and negative stipulations, the former of which are incapable of being specifically enforced, a violation of the latter, if they constitute a distinct and substantive part of the agreement, will be restrained by injunction.¹ But not, if the affirmative and negative stipulations cannot be separated. Thus, where A. had given B. a sum of money, and B. had covenanted that he would buy all the acids he wanted from the manufactory of A., who covenanted that he would supply the acids, and B. also covenanted that he would buy his acids from no other person, Lord Lyndhurst refused to prohibit B. from obtaining acids from any other quarter, both because the covenants were correlative, and because he could not compel A. to supply B. with acids; and if therefore he had restrained B. from taking acids from any other quarter, he might have ruined him in the event of A. breaking his affirmative covenant to supply the acids.²

§ 114. *Restraining party from violating negative stipulation.*—When a person enters into an agreement not to do a certain thing, the contract may be enforced by an injunction restraining the act. Thus, where the plaintiffs, who lived near a church, agreed with the parson, church-wardens, overseers, and other inhabitants of the parish that the former should erect a new cupola, clock, and bell to the church, and that the bell, which had been rung every day at five o'clock in the morning, thereby greatly disturbing the plaintiffs, should not be rung during the lives of the plaintiffs or the survivor of them, and the plaintiffs having fulfilled on their part, and the bell afterward again rung, the parish authorities were restrained from violating

¹ Holmes v. Eastern Counties R.R. Co., 3 K. & J., 675; Dietrichsen v. Caburn, 2 Phil., 52; Gt. Northern R.R. Co. v. Manchester, Sheffield & Lincolnshire R.R. Co., 5 De G. & Sm., 138; Whittaker v. Howe, 3 Beav., 383, 395.

² Hills v. Croll, 2 Phil., 60; Kerr on Injunc., 529. See *post*, § 117. Where, however, a partner agreed to exert himself for the benefit of the firm and not carry on the same kind of business except as a partner, it was held that the court might, if the partnership were subsisting, grant an injunction against the breach of the latter stipulation, though it had no power to enforce the former. Morris v. Coleman, 18 Ves., 437; S. C., 6 Sim., 335.

their agreement.¹ The violation of covenants in separation deeds has been restrained, as: that the husband will not molest his wife;² or that he will not take any legal proceedings for the restitution of conjugal rights;³ or that the wife will not endeavor to compel her husband to allow her "any further or greater support, maintenance, or alimony" than a certain annuity.⁴ Where a creditor enters into an agreement with his principal debtor for forbearance to sue, and the creditor, notwithstanding, obtains a judgment at law against the sureties before they have notice of the contract of indulgence, equity, on the application of the sureties, will perpetually enjoin the judgment.⁵ Where a vendor of land covenants with the vendee that he will not bring a suit on the bond given for the purchase money until the quantity of land sold is ascertained, a violation of the agreement by the vendor will be restrained by injunction.⁶ Where the maker of a medicine entered into a contract with a person that in consideration the latter would advertise and sell the medicine, the former would not furnish it to anybody else for sale under a specified price, and such person fulfilled the contract on his part, it was held that the maker of the medicine would be enjoined from violating the agreement.⁷ So, an author who, in selling a work, covenanted not to do anything to injure the sale of the work, was enjoined from publishing a rival work on the same subject.⁸

§ 115. *To prevent breach of agreement in relation to use of premises.*—Equity will restrain by injunction the violation of a covenant in a deed restricting the use of land sold. A., owning two adjoining lots bounded on a river,

¹ *Martin v. Nutkin*, 2 P. Wms., 266. This was one of the earliest of the cases in which the court interfered by perpetual injunction to enforce performance of negative agreements.

² *Sanders v. Rodway*, 22 L. J. Ch., 230.

³ *Hunt v. Hunt*, 8 Jur. N. S., 86.

⁴ *Williams v. Baily*, L. R. 2, Eq. 731.

⁵ *Armistead v. Ward*, 2 Patton & Heath, 504.

⁶ *Bullitt v. Songster*, 3 Munf., 54.

⁷ *Dietrichsen v. Cabburn*, 2 Phil., 52.

⁸ *Barfield v. Nicholson*, 2 Sim. & Stu., 1; 2 L. J. Ch., 90.

upon one of which stood his family mansion, sold the other lot to B., who covenanted that he would not devote the lot to any purpose which might be offensive or injurious to the occupier of the adjoining property, and that he would not use it for a stone quarry. B. having leased his river-front for the construction of a wharf and railroad, to be used for the transportation and loading into vessels of stone from a quarry, he was restrained by injunction.¹ The owner of real estate in a city divided it into lots, which he sold to different persons by conveyances containing mutual covenants between the grantor and grantees against the erection of any structure or the carrying on of any business which might be offensive to the neighborhood. It was held that the covenants in the several deeds were for the mutual benefit and protection of all of the purchasers of lots, and that, although a previous purchaser could not maintain an action at law upon the covenant in the deed to a subsequent purchaser, yet that he was entitled to protection by injunction against the carrying on of an offensive business upon the lot of such subsequent purchaser.² Where the proprietors of a public garden having let a house adjoining thereto, with a covenant not to carry on certain trades therein upon penalty of forfeiture of the lease and the payment of fifty pounds a month to the proprietors of the garden, and the lessees having executed a sub-lease to the defendant, he was enjoined from carrying on the prohibited business, the court saying, "It is in the nature of specific performance. I think you will find many cases. The breach of the agreement may consist in repeated acts."³ And where commissioners leased a lot of land to the plaintiffs, in order that the latter might erect a club-house

¹ Seymour v. McDonald, 4 Sandf. Ch., 502.

² Barrow v. Richards, 8 Paige Ch., 351.

³ Barrett v. Blgrave, 5 Ves., 555; S. C. 6, Ib. 104; and see Williams v. Williams, 3 Mer., 157; Fleming v. Snook, 5 Beav., 252; Kemp v. Sober, 1 Sim. N. S., 520; Johnstone v. Hall, 2 K. & J., 423; Wickenden v. Webster, 6 E. & B., 387; Hodson v. Coppard, 1 H. & M., 167; Steward v. Winters, 4 Sandf. Ch., 587.

thereon, and agreed that the adjoining land should be laid out as a garden, and not be built on, and the commissioners afterward permitted stables to be erected on the land, the court enforced specific performance of the agreement by enjoining the defendants from continuing their erections, and from allowing such as were already there to remain.¹ A covenant by a railroad company, in a deed of purchase, not to erect any building on the land more than eighteen feet in height within eighty feet of other property of the vendor, was enforced by injunction.² And where land was sold upon condition that the purchaser would not build on it until permission was given, he was restrained from building before he had received permission.³ A covenant, not in a lease, having been inserted in an assignment of the lease, not to carry on a particular trade on the demised premises, a lessee of the assignee was restrained from carrying it on.⁴ And a person who covenanted not to let any house as a hotel, or any land for the erection of any house to be used as a hotel, or inn, within certain limits, was restrained from doing any act in violation of the covenant.⁵ Where the lessee of a store was restricted by the lease to occupy the premises for the regular dry-goods jobbing business, and for no other, it was held that he might be restrained by injunction from using the store for any other purpose, without its being shown that the complainant would otherwise sustain irreparable, or even substantial, injury. In such case, the ground of relief, as stated by the court, was as follows: "Where parties, by an express stipulation, have themselves determined that a particular trade or business conducted by the one will be injurious or offensive to the

¹ Rankin v. Huskisson, 4 Sim., 13.

² Lloyd v. London, Chatham & Dover R.R. Co., 2 De G. J. & S., 568. And see Clark v. Martin, 49 Pa. St., 289, in which the violation of a covenant not to erect a building, on a lot sold, more than ten feet in height, was restrained by injunction.

³ Atty. Genl. v. Briggs, 1 Jur. N. S., 1084.

⁴ Jay v. Richardson, 30 Beav., 563; Clements v. Welles, 1 L. R. Eq., 200.

⁵ Sanders v. Rodway, 16 Beav., 211.

other, and there is a continuing breach of the stipulation by the one, which the court can perceive may be highly detrimental to the other, although, on the facts presented, it is not clear that there is serious injury, and it is manifest that the extent of the injury is difficult to be ascertained or measured in damages, it is the duty of the court, by injunction, to restrain further infractions of the covenant, thereby preventing a multiplicity of petty suits at law, and at the same time protecting the rights of the complainant.”¹

§ 116. *To restrain application to legislature in violation of agreement.*—Specific performance of an agreement not to apply to the legislature may, in a proper case, be enforced by means of an injunction; equity in such case acting *in personam*, and not in any way interfering with the legislative proceedings.” It will not be a ground for an injunction that the proposed application will annul existing rights and create new ones, as that would imply a right to restrain legislative action in all such cases.² So, such an agreement will not be enforced by restraining its violation, even where it was entered into for the protection of private interests, if the proposed application can be justified on grounds of public policy.⁴ Where company A agreed

¹ *Steward v. Winters*, 4 Sandf. Ch., 628. Although covenants in total restraint of trade are void upon grounds of public policy (*Mitchell v. Reynolds*, 1 P. Wms., 181; *Chesman v. Nainby*, 2 Stra., 739; S. C., 2 Ld. Raym., 1456; *Wickens v. Evans*, 3 Y. & J., 318; *Mallan v. May*, 11 M. & W., 653; *Ward v. Byrne*, 5 Ib., 548; *Hinde v. Gray*, 1 M. & G., 195), yet covenants in partial restraint of trade, where the limitation is reasonable, will be enforced by injunction, as they encourage the employment of capital and promote industry. *Homer v. Ashford*, 3 Bing., 326; *Tallis v. Tallis*, 1 E. & B., 391; *Mumford v. Gething*, 7 C. B. N. S., 305. The court will not enforce by injunction a covenant which is vague and indefinite: *Mann v. Stephens*, 15 Sim., 379; *De Mattos v. Gibson*, 4 De G. & J., 276; *Paris Chocolate Co. v. Crystal Palace Co.*, 1 Sm. & G., 119; *Bernard v. Meara*, 12 Ir. Ch., 389; *Armstrong v. Courtney*, 15 Ib., 138; *Low v. Innes*, 10 Jur. N. S., 1037; or harsh and oppressive: *Kimberley v. Jennings*, 6 Sim., 340; *Talbot v. Ford*, 13 Ib., 173; *Croft v. Haw*, 5 L. J. Ch. N. S., 305; or if by the enforcement of the contract one of the parties will obtain a considerable advantage at the expense of, and without a corresponding benefit to, the other: *Mann v. Stephens*, *supra*; *Shrewsbury & Birmingham R.R. Co. v. London & Northwestern R.R. Co.*, 6 H. L., 113.

² *Ware v. Grand Junction Water-Works Co.*, 2 Russ. & M., 470, 483. And see *Atty. Genl. v. Manchester & Leeds R.R. Co.*, 1 Rail. Cas., 436.

³ *Heathcote v. North Staffordshire R.R. Co.*, 2 M’N. & G., 100.

⁴ *Lancaster & Carlisle R.R. Co. v. Northwestern R.R. Co.*, 2 K. & J., 293. See *Stockton & Hartlepool R.R. Co. v. Leeds, etc., R.R. Co.*, 2 Phil., 666.

with company B not to make any line connecting their respective roads excepting one, application for which had already been made, in consideration that company B would support, instead of oppose (as they had before done), the application of company A for the last-mentioned line, and the former performed their part of the agreement, and the application succeeded, the court nevertheless refused to enjoin the defendants from applying to Parliament in violation of their agreement: for the reason that if such an application were successful, it would be so on public grounds; and if unsuccessful, the breach of the agreement might be compensated in damages.¹

§ 117. *In case of breach of engagement for personal services.*—Equity formerly declined to restrain the violation of a negative stipulation in a contract when it could not enforce the affirmative part of the agreement, the aggrieved party being obliged to seek his redress at law. Thus, where an actor entered into an agreement with the proprietors of Covent Garden Theatre to perform there for twenty-four nights, and in the meantime not to act at any other place in London, it was held that as the court could not enforce the positive part of the contract, it would not restrain by injunction a breach of the negative part.² So an actor who had agreed in

¹ Lancaster & Carlisle R.R. Co. v. Northwestern R.R. Co., *supra*.

² Kemble v. Kean, 6 Sim., 333; subsequently overruled in Webster v. Dillon, 3 Jur. N. S., 432. In Kemble v. Kean, *supra*, the terms of the agreement were complied with except as to ten nights, when Kean left to perform at Drury Lane. The plaintiff thereupon filed a bill praying that the defendant might be decreed specifically to perform his contract, and that in the meantime he might be restrained from acting at Drury Lane. The lord chancellor granted an injunction *ex parte* restraining the defendant from acting at Drury Lane until he had acted the ten nights at Covent Garden, with liberty for the defendant to move to dissolve the injunction before the vice-chancellor. The latter dissolved the injunction on the ground that the court had no power to enforce such a contract. He said: "The bill is filed for the purpose of enforcing an agreement which mainly consists in the defendant's acting; and it appears to me that it is utterly impossible that this court can execute such an agreement. In the first place, independently of the difficulty of compelling a man to act, there is no time stated, and it is not stated in what character he shall act; and the thing is altogether so loose that it is perfectly impossible for the court to determine upon what scheme of things Mr. Kean shall perform his agreement. There can be no prospective declaration or direction of the court as to the performance of the agreement; and, supposing Mr. Kean should resist, how is such an agreement to

writing with a theatrical manager not to perform at any other theatre for a term of years, having broken his engagement, and a bill having been filed to restrain him by injunction, and to compel performance, it was held that it was a mere matter between employer and employed, and that the remedy was at law; and an injunction which had been granted was dissolved.¹ In a subsequent case it was alleged in the bill that the defendant had contracted with the plaintiff to perform and sing in concerts and operas, and that he would not enter into an engagement with anybody else, that he was about to form other engagements, and to leave the State, and the plaintiff prayed for a decree of specific performance, and for an injunction, and a writ of *ne exeat*. On a motion by the defendant to dissolve the injunction, and discharge the *ne exeat*, the court, in granting the motion, said: "Although there may be cases in which a court of equity will decree specific performance of a contract for personal services, still, this is not one of that character. The difficulty, if not the utter impracticability, of compelling a specific performance of the contract set forth in the bill, is a conclusive reason why this court should refuse its interference. The complainant should be left to his remedy at law. If, however, there were any doubt upon principle, yet I consider it abundantly settled upon authority, that the complainant can have no relief upon the equity side of the court."² But it is obvious that a tenacious adherence to the foregoing doctrine would often deprive the complainant of all redress. In England a more just practice is now established; and the tendency in the United States is in the same direction. In *Lumley v. Wagner*,³

be performed by the court? Sequestration is out of the question. And can it be said that a man can be compelled to perform an agreement to act at a theatre by this court sending him to the Fleet for refusing to act at all? There is no method of arriving at that which is the substance of the contract between the parties by means of any process which this court is enabled to issue."

¹ *Hamblin v. Dinneford*, 2 Edw. Ch., 529. See *De Rivafrinoli v. Corsetti*, 4 Paige Ch., 264; *Phillips v. Stauch*, 20 Mich., 369; *Burke v. Seeley*, 46 Mo., 334.

² *Sanquirico v. Benedetti*, 1 Barb., 315.

³ 1 De G. M. & G., 604.

the plaintiff had entered into a written contract with Ma'lle Wagner, cantatrice to the King of Prussia, for her services for three months at his theatre in London, upon certain specified terms; and there was a condition inserted, that she should not use her talents at any other theatre, nor in any concert or re-union, without the written consent of the plaintiff. She subsequently entered into an engagement to sing at another theatre. The plaintiff thereupon filed a bill for an injunction to restrain her from performing or singing in violation of her engagement with him. An injunction having been granted by the vice-chancellor, a motion to dissolve it, which came before the lord chancellor, was denied.¹ So, it has been held that where a party enters into a written contract with an artist, that the latter shall work for the former for a certain period at an agreed price, and shall not work for any other person during said time, such artist may be restrained by injunction from violating his agreement by working for anybody else.² Where an actor

¹ Lord Chancellor St. Leonards said: "Where is the mischief of exercising this jurisdiction? I cannot compel her to perform, of course. That is a jurisdiction the court does not possess; and it is very proper it should not possess it. But what cause of complaint is it, that I should prevent her from doing an act which may compel her to do what she ought to do? Though I cannot compel the execution of the whole contract, I leave nothing unaccomplished which I hold it to be in the power of the court to accomplish. By preventing her from doing the act, there will be no case in an action by Mr. Lumley against her for such an amount of vindictive damages as a jury might possibly be disposed to give if she exercised her talents in a rival theatre."

² *Fredericks v. Mayer*, 13 How. Pr., 566, N. Y. Superior Court. In this case, Hoffman, J., said: "I am inclined to the opinion, that services which involve the exercise of powers of mind, which in many cases, as of writers, and performers, are purely and largely intellectual, may form a class in which the court will interfere. Such services are generally individual, and peculiar. They exist in nature, or in degree, with some modification of character or expression in the one person. The element of mind exhibited in the subject of the contract, as distinguished from what is mechanical and material, may perhaps furnish a rule of distinction and decision." An injunction was denied in the foregoing case, on the ground that the plaintiff had no house or place of business distinct from the person for whom the defendant worked in alleged violation of his agreement, but was, in fact, a partner of such person. In a subsequent case, the same judge reiterated the foregoing views, as follows: "I am unwilling to hold, and do not think I am bound by the cases to hold, that where there are clear and absolute negative stipulations on the part of a party, upon a subject involving in part the exercise of intellectual qualities, and a special case of the impossibility or great difficulty of measuring damages is presented, that the jurisdiction to forbid the violation of such covenants does not exist." *Butler v. Galetti*, 21 How. Pr., 465.

having engaged to perform at the plaintiff's theatre for a certain sum, and not to perform elsewhere during the time, entered into an engagement to perform at another theatre before the expiration of the contract, it was held that he might be restrained from carrying out his second engagement.¹ But a motion for an injunction to prevent a public dancer from violating a covenant not to render her personal services to any other person than the plaintiff, was denied, where it appeared that the plaintiff had no place at which the defendant could fulfil her engagement, and that consequently he was not sustaining any damage.² An agreement entered into between a publisher and an author, that the latter should write for the former, and should not, during the continuance of the agreement, write for any other publication, was enforced by injunction; and another publisher was restrained from employing him.³ In England it is now held that an actor, who has agreed to perform for a definite time at a particular theatre, may be restrained by injunction from performing at any other theatre during the period of his engagement, without any negative clause in the contract restricting him from performing elsewhere.⁴

¹ *Hayes v. Willio*, 11 Abb. Pr. N. S., 167.

² *De Pol v. Sohlke*, 7 Robertson, N. Y., 280.

³ *Stiff v. Cassell*, 2 Jur. N. S., 348.

⁴ *Montague v. Flockton*, L. R. 16, Eq. 189. "A man agreeing to act in one particular theatre during the season, is party to a contract that he will act there and not anywhere else. A negative contract is as necessarily implied as if it had been plainly expressed." *Ibid*, per *Malins v. C.*, referring to *De Mattos v. Gibson*, 4 De G. & J., 276, which involved the same principle. But in opposition to this reasonable and just proposition, it was not long since held in Pennsylvania, that the personal services of an actor would not be enforced by a court of equity by enjoining him from performing at any other theatre. The court, per *Hare, J.*, said: "Is it not obvious that a contract for personal services thus enforced, would be but a mitigated form of slavery, in which the party would have lost the right to dispose of himself as a free agent, and he, for a greater or less length of time, subject to the control of another? And as this objection is to the substance of the relief desired, and not to the form, it must prevail even when the agreement to render the service is coupled with a stipulation that the contracting party will not enter into the employment of another master or engage in work of any other kind. Otherwise the court might be compelled to transcend the limits within which its jurisdiction ought to be confined, and engage in a contest where the sympathies of mankind would be with the weaker party, by simply coupling the affirmative words with a negative stipulation that the covenantor will not do for others what he agrees to do for the covenantee."

I deem it unnecessary to carry the argument further on a point which must be intuitively apprehended by every man of sound judgment." *Ford v. Jermon*, 6 Phila., 6. A short, and it seems to us conclusive, answer to the foregoing is, that the actor, in the given case, has sold his services for the stipulated time, and by parity of reasoning, the seller of some rare article might, notwithstanding his agreement, proceed, in violation of it, to dispose of the same thing to another person, and be deemed by the court an object of sympathy, and entitled to its encouragement and protection in a proceeding essentially unfair and dishonorable, if not dishonest. In this instance, the weaker party is the employer, and not the employé, who, if permitted to break his engagement, has the other in his power, and may at any time subject him to serious loss. The ordinary case of hiring and service presents a totally different question.

CHAPTER IV.

WRIT OF NE EXEAT.

118. Origin and nature.

119. Demand must be equitable and certain.

120. Not granted when defendant held to bail.

§ 118. *Introduction and how employed.*—The writ of *ne exeat*, which is a remedy appertaining to the exclusive jurisdiction of equity, is sometimes called into requisition in suits for specific performance. It was unknown to the ancient common law, which permitted any man to depart the realm at his pleasure.¹ But being of practical importance, and often indispensable to justice, it dates from a very early period—probably between the reign of King John and that of Edward I. It originated in the idea that, as every subject was bound to defend the king and his realm, the king might, as a part of the prerogative of the Crown, command any man not to leave the realm. In this country it is a writ of right, rather than a prerogative writ. It is in general only granted in case of equitable debts and claims; there being in relation to legal claims an adequate remedy at law.² It has been defined, “A *mesne* process, issuing from the court of chancery, to hold a party to equitable bail, that he may not depart from the realm or the jurisdiction of the court, but be present with his body to answer any decree which the court of chancery may make in the case against him, and commanding the arrest and imprisonment of the defendant if he or she fail to furnish such bail.”³ It “bears no resemblance to the *mesne* or

¹ Beames on *ne exeat*, 1.

² Seymour v. Hazard, 1 Johns. Ch., 1; Forrest v. Forrest, 10 Barb., 46.

³ Adams v. Whitcomb, 46 Vt., 708, per Ross, J.; 3 Blk. Com., 213; 3 Danl. Ch. Pr., 1801.

final process of the common law courts. Its primary purpose is not to arrest the defendant, nor to put him in safe custody during the pendency of the litigation. . . . It commands the sheriff to cause the defendant to come before him and give sufficient security that he will not go without the State into foreign parts without leave of the court; and if he shall refuse to give such security, then to commit him to the common gaol of the county until he do so of his own accord. Until he refuses to give the requisite security, he cannot be restrained of his liberty; and when he has given it, he may go wherever he pleases, provided he is within the jurisdiction of the court when its process to enforce the decree issues. In the meantime, he is not deemed to be in the custody of any person."¹ The remedy need not necessarily be by writ, but may be by an order that the party within a limited time give security that he will not depart, and, in default, that an attachment issue for contempt.²

§ 119. *When granted or refused.*—It must be shown that there is not an adequate remedy at law.³ Where, however, a court of equity has concurrent jurisdiction with the courts of law, it will not refuse to grant a writ of *ne exeat* merely because the plaintiff has a remedy at law;⁴ as in the case of a vendor of land, who, although he may proceed at law for the purchase money, is yet entitled to a *ne exeat* to restrain the purchaser from going abroad until he has

¹ Brown, J., in *Bushnell v. Bushnell*, 15 Barb., 309. Whenever the defendant intends to leave the State, the complainant, upon producing evidence of such intention and of his equitable claim, has a right to equitable bail. *Mitchell v. Bunch*, 2 Paige Ch., 617. The writ may be applied for at any stage of the proceedings. *Dunham v. Jackson*, 1 Paige Ch., 629; but see *Sharp v. Taylor*, 11 Sim., 50. The power of a court of equity independently of any statute to obtain security for the performance of its decree by ordering by a writ of *capias* the arrest of a party intending to leave the State to avoid such decree, is analogous to the practice pertaining to the writ of *ne exeat*. *Samuel v. Wiley*, 50 N. H., 353.

² *Atty.-Genl. v. Mucklow*, 1 Price, 289.

³ *Orme v. McPherson*, 36 Ga., 571.

⁴ *Lucas v. Hickman*, 2 Stew., 11; *Macdonough v. Gaynor*, 18 N. J. Eq., 249.

given security for the amount.¹ The demand must in general be an equitable debt or pecuniary claim which is due, and be certain or capable of being reduced to a certainty.² Therefore, it will not be granted on the ground that the plaintiff is apprehensive that the defendant may not be willing to fulfil an engagement for personal services, when, from the peculiar nature of those services, they cannot be performed until a future day.³ A general unliquidated demand, or one in the nature of a claim for damages which cannot be regarded as a debt until the decree, will not lay a foundation for the writ.⁴ Where the demand was merely contingent, consisting of the claim of a wife against her husband under a marriage settlement in case she survived him, the application was refused, as the contingency might never happen.⁵ The writ was refused upon a bill to enforce an agreement to give the plaintiff a bill of exchange as a security for a demand.⁶ So, the writ was discharged where the plaintiff claimed that he was entitled to it on the ground that the defendant was bound to convey to him one-half of a patent-right, which he refused to do.⁷ A *ne exeat* will be

¹ Boehm v. Wood, T. & R., 332. The writ will be granted, notwithstanding the vendor has a lien upon the land for the purchase money which he may enforce by selling the land.

² Whitehouse v. Partridge, 3 Swanst., 365; Bonesteel v. Bonesteel, 28 Wis., 245. A petition for a *ne exeat* alleged that the petitioner was the owner by assignment of two promissory notes; that, according to the petitioner's information and belief since said notes were made, the maker had sold the greater part of his property and was endeavoring to sell the remainder, and threatened to leave the State and take his property with him, and said that he would not pay the notes. It was held that in a case like the foregoing, not of an equitable nature, the plaintiff must show by his petition, by facts stated and circumstances detailed, that the debtor had been guilty of fraud, or that there was a strong presumption of fraud; which, not having been done, the judgment of the court below granting the writ must be reversed. Malcolm v. Andrews, 168 Ill., 100.

³ De Rivafinoli v. Corsetti, 4 Paige Ch., 264.

⁴ Graham v. Stucken 4 Blatchf., 50.

⁵ Anon. 1 Atk., 521; see Porter v. Spencer, 2 Johns. Ch., 169; Cox v. Scott, 5 Harr. & Johns., 384; Brown v. Haff, 5 Paige Ch., 235. A party may have relief in some cases against his principal, where the debt has become due, by compelling the principal to discharge the debt in exoneration of the surety. Gibbs v. Mermaud, 2 Edw. Ch., 482.

⁶ Blaydes v. Calvert, 2 J. & W., 211.

⁷ Cowdin v. Cram, 3 Edw. Ch., 231. Where the defendant had sold and conveyed all of his property, and converted the same into money or choses in action,

granted in a suit for specific performance against the vendee where the purchase money constitutes the demand against him, the payment of which is sought to be enforced, when it clearly appears that the vendor can give a good title and the defendant is about to leave the jurisdiction, "because there is an equitable moneyed demand of indebtedness, the amount of which governs the court in marking the writ for bail."¹

§ 120. *Consequence of holding defendant to bail.*—A court of equity will not grant the writ if the defendant has been held to bail for the same demand. Where, therefore, the vendor caused the purchaser to be arrested at law, and held to bail for the amount of the purchase money, and the plaintiff having discontinued the suit, the bail was discharged, a writ of *ne exeat* afterward obtained by the same plaintiff upon a bill to enforce the contract, was dismissed.²

and was threatening to leave the State and thereby prevent the plaintiff from having an accounting and settlement of partnership transactions, it was held that a writ of *ne exeat* was properly issued. *Dean v. Smith*, 23 Wis., 483; see *Myer v. Myer*, 25 N. J. Eq., 28. In Arkansas the statute allows the writ in cases where there are contracts or covenants to be performed, and the time for payment or performance has not arrived, if the complainant entered into the agreement in good faith, and without any information of an intention on the part of the defendant to leave the State. *Gresham v. Peterson*, 25 Ark., 377.

¹ *McCoun v. C.* in *Cowdin v. Cram*, *supra*.

² *Raynes v. Wyse*, 2 Mer., 472; and see *Amsinck v. Barklay*, 8 Ves., 594.

BOOK III.

DEFENCES.

CHAPTER I.

INCAPACITY OF PARTY.

- 121. What subjects considered.
- 122. Incapacity of defendant to contract.
- 123. Incapacity of plaintiff.
- 124. Person holding confidential position.
- 125. Where defendant has no power to perform agreement.
- 126. Party acquiring power to perform subsequent to entering into contract.
- 127. Where consent of third person is necessary.
- 128. Agreement substantially carried out.
- 129. Where contract is illegal in form.
- 130. In case of disability as to part of contract.
- 131. Where contract is in the alternative.

§ 121. *In what it may consist.*—The absence of jurisdiction where the contract itself is such that the court cannot enforce its performance, has already been considered.¹ The objection to which attention is now called is wholly different, not having to do with the nature or terms of the agreement, or the power of the court, but with considerations personal to one or other of the parties. It is, moreover, an objection fundamental in its character and not peculiar to the jurisdiction of equity in specific performance, but equally available at common law; and it is one which, to be understood and accepted, requires but little more than its announcement. What follows, therefore, under this head will be brief. A person may either have been incapable of contracting, or not have the power to perform the agreement when made. The former is to be judged of at the time of the contract, while the question as to inability to

¹ *Ante*, § 49.

perform is to be determined when performance is required. Both of these objections, though differing as matters of defence, seem appropriately to range themselves under one head; and they will therefore form the subject of this chapter.

§ 122. *May be alleged in behalf of defendant.*—It will be a defence, that one of the parties to the contract sought to be enforced was incapable of making a valid agreement; and, on the principle of mutuality, the objection, as we shall presently see, may be made by one who is himself competent. Personal incapacity on the part of the defendant to enter into a binding agreement at the time it is alleged to have been made, will, of course, be a sufficient defence to a suit for specific performance: as in case of temporary deprivation of reason caused by gross intoxication;¹ but not the mere fact that the party at the time of entering into the contract had partaken freely of intoxicating liquor, in the absence of fraud, or of evidence that he had not a full understanding and knowledge of what he was doing.²

§ 123. *Of party bringing suit.*—The personal incapacity of the plaintiff at the time of filing the bill would constitute a defence to a suit for specific performance;³ but not his incapacity when he entered into the contract if his incapacity has since been removed.⁴ An infant cannot, while an infant, enforce the contract;⁵ nor can the other party during the infancy rescind it.⁶ But when an infant, after coming of age, affirms the contract by filing a bill for spe-

¹ *Malins v. Freeman*, 2 Keen, 34; *Cooke v. Clayworth*, 18 Ves., 12; *Cragg v. Holme*, *ib.*, 14, *n.*; *Nagel v. Baylor*, 3 Dr. & W., 60; *Campbell v. Ketcham*, 1 Bibb., 406; *Wigglesworth v. Steers*, 1 Hen. & Munf., 70; *White v. Cox*, 3 Hayw., 82; *Morrison v. McLeod*, 2 Dev. & Batt., 221; *Ford v. Hitchcock*, 8 Ohio, 214; *Conant v. Jackson*, 16 Vt., 335; *Prentice v. Achorn*, 2 Paige Ch., 30; *Donelson v. Posey*, 13 Ala., 752; *Cavender v. Waddingham*, 2 Mo. App., 551.

² *Lightfoot v. Heron*, 3 Y. & C. Ex., 586; *Shaw v. Thackray*, 1 Sm. & G., 537. See 1 Story's Eq. Juris., Sec. 230, *et seq.*; *post*, § 162.

³ *Flight v. Bolland*, 4 Russ., 298; *Richards v. Green*, 23 N. J. Eq., 538.

⁴ *Clayton v. Ashdown*, 9 Vin. Abr., 393.

⁵ *Flight v. Bolland*, *supra*. An infant cannot maintain a suit for specific performance, because the contract could not be enforced against him.

⁶ *Smith v. Bowen*, 1 Mod., 25; *Shannon v. Bradstreet*, 1 Sch. & Lef., 58.

cific performance, or otherwise, it becomes mutual, and he is bound by it.¹ A married woman is entitled to a specific performance of her contract of purchase when her separate estate is sufficient to enable her to fulfil her obligations under it.²

§ 124. *On account of fiduciary relation.*—The incapacity of a party to contract may be objected, on the ground that he is a trustee, guardian, agent, or other person holding a confidential position. But questions of this character depend upon the general doctrines of the court

¹ Milliken v. Milliken, 8 Ired. Eq., 16.

² Hulme v. Tenant, 1 Bro. C. C., 16. In the case of *femes covert*, the court proceeds upon the principle that if a married woman have not separate property, she is incapable of contracting; and if she have, she can only contract in relation to that; and the remedy is against such property, and not against her personally. Francis v. Wigzell, 1 Mad., 258; Aylett v. Ashton, 1 My. and Cr., 105; Humphreys v. Hollis, Jac., 73. The power of the wife to contract with her husband is not restricted to her separate property, but extends to other matters, as to which she may be regarded, for the purposes of the contract, as a feme sole. Thus, a wife suing her husband for a divorce, may contract with him to abandon the suit. Vansittart v. Vansittart, 4 K. & J., 62. "A *feme covert* is not competent to enter into contracts so as to give a personal remedy against her. Although she may become entitled to property for her separate use, she is no more capable of contracting than before; a personal contract would be within the incapacity under which a *feme covert* labors." Lord Cottenham, 1 My. & Cr., 111, 112. A married woman possessed of separate property, and living apart from her husband, verbally agreed for the lease of a house. The agreement was reduced to writing, signed by the lessor's agent, and handed to her. She did not execute it, but, in letters written by her, referred to it as an agreement; and she took possession. In a suit by the lessor against her and her trustees, to enforce the payment of the rent, it was held that she was liable to the extent of her separate estate. Gaston v. Frankum, 2 De G. & Sm., 561. When a married woman undertakes to contract by means of a power, to be exercised in a particular way, and she does not observe the required formalities, the instrument is void as an agreement, and specific performance cannot be decreed against her. Martin v. Mitchell, 2 J. & W., 413, 434. See *ante*, § 66, note 2, p. 93.

A contract entered into by a lunatic, during a lucid interval, is binding. Hall v. Warren, 9 Ves., 605. As to proof of a lucid interval, see Atty. Genl. v. Parnther, 3 Bro. C. C., 441; Holyland *ex parte*, 11 Ves., 10; Ray's Med. Juris. Ch., 14. When, after a person has contracted, it is discovered that he was previously a lunatic, the other may bring a suit for specific performance, and obtain an issue to ascertain whether the defendant was a lunatic at the date of the contract, and if so, whether he had lucid intervals, and whether the contract was executed during such an interval. Hall v. Warren, *supra*. Or the plaintiff may ask, in the alternative, to have the contract either performed or discharged; and in the latter case, the court will allow him, if vendor, to retain out of the deposit his costs, charges, and expenses. Frost v. Beavan, 17 Jur., 369. See Neill v. Morley, 9 Ves., 478. In determining the question of insanity, a court of equity is governed by the same principles as a court of law. Bennet v. Wade, 2 Atk., 327; Osmond v. Fitzroy, 3 P. Wms., 129. The subsequent lunacy of a party to a contract does not affect the rights of the other party. Owen v. Davies, 1 Ves. Sen., 82.

with regard to such relations, and oftener arise in suits to set aside the transaction than in proceedings for specific performance.

§ 125. *Inability of defendant.*—If it be out of the power of the defendant to perform the agreement, it necessarily constitutes a sufficient reason why the court should refuse to decree specific performance; or, in other words, to do what would be nugatory. This is so obvious as scarcely to require any illustration.¹ Where, in a suit against the provisional committee of a projected railroad company for the specific performance of a contract to deliver to the plaintiff scrip certificates, it was not alleged that the defendants had any scrip which they could deliver, but there was an averment from which the contrary might rather be inferred, a demurrer was sustained on the ground that the bill did not show that the defendants were able to fulfil.² The result will be the same, notwithstanding the defendant may have been in a situation to carry out the contract when he entered into it, but afterward deprived himself of the ability to do it by his own voluntary and wrongful act. If, for instance, A., after entering into a valid agreement to sell and convey real estate to B., should convey it to C., who is a *bona fide* purchaser for a valuable consideration without notice, A., by depriving himself of the power to fulfil his agreement with B., also deprives B. of the right to a decree for specific performance.³ When, however, the court has

¹ Green v. Smith, 1 Atk., 573; Danforth v. Phila., etc., R.R. Co., 30 N. J. Eq., 12.

² Columbine v. Chichester, 2 Phila., 27. And see Hallett v. Middleton, 1 Russ., 243; Ellis v. Colman, 4 Jur. N. S., 350; Phillips v. Stauch, 20 Mich., 369.

³ Denton v. Stewart, 1 Cox, 258; Greenaway v. Adams, 12 Ves., 395; Smith v. Kelley, 56 Me., 64; Gupton v. Gupton, 47 Mo., 37. When the vendor of land by contract, conveys the property contracted to be sold to a third person in such a manner that the land cannot be reached, the court will not entertain a bill in equity for specific performance merely for the purpose of compensating the purchaser in damages, but will leave him to his action upon the agreement. Some ground of equitable interference will be required to induce a court of equity to grant relief in such a case. But a mere contract to convey the land to a third person will not be a defence.

properly obtained jurisdiction, it is not necessary, as will be seen hereafter,¹ that the plaintiff be remanded to an action at law simply because the evidence shows that the defendant has put it out of his power to perform the contract, but the suit may be retained and compensation given in damages.²

§ 126. *Ability acquired subsequent to contract.*—Although a party, when he entered into a contract, had no power to fulfil, yet if he afterward acquires the power, he is bound to perform his agreement. Mr. Fry,³ in illustration of this principle, mentions the following case decided in the reign of Charles II. During the civil war, the then Duke of Newcastle being abroad, the defendant, who was his heir apparent, without his authority sold and conveyed to the plaintiff certain estates of the duke, and received and used the purchase money for the benefit of the family. The defendant having afterward succeeded to the dukedom and the estates in question, as heir, he was held bound to make good the sale, which was decreed.⁴ And if the defendant, though he have not the present ability to perform the contract, is able to acquire it, he will be compelled to do so, and to carry out his agreement.⁵ Therefore, when a bill for specific performance is filed against the vendor, he cannot object that he does not own the interest he has contracted to sell; as he will not be permitted to say that he does not mean to obtain such interest.⁶ So, where the defendant, who had contracted to give to the plaintiff an indemnity secured on real estate, alleged that he had no real

¹ *Post*, § 517.

² *Renkin v. Hill*, 49 Iowa, 270. See *Stearns v. Beckham*, 31 Gratt., 379. A vendee will not lose his right against a vendor who can complete, because, from a circumstance of which the purchaser had no knowledge, he has no right against another person who cannot complete. Where, for instance, an agreement is entered into by A. and B. with C., and it afterward appears that B. had no interest in the property, A. may nevertheless be compelled to convey his interest to C. *Harrocks v. Rigby*, L. R. 9, Ch. D. 180.

³ *Specif. Perform.*, 291.

⁴ *Clayton v. Duke of Newcastle*, 2 Cas. in Ch., 112.

⁵ *Carne v. Mitchell*, 15 L. J. Ch., 287. ⁶ *Browne v. Warner*, 14 Ves., 412.

estate of sufficient value, and insisted that the plaintiff ought to accept a personal indemnity, it was held that the defendant was bound to purchase real estate of sufficient value.¹ If a person agrees to convey land to another on a certain day thereafter, and on the day named he owns the land, the agreement is binding on both parties.² Contracts which require the interposition of the legislature before they can be carried into effect, will not be regarded as void.* An agreement for the sale of personal property not at the time in the possession of the seller, is valid, and may be enforced, if that be the only objection to a decree for specific performance.⁴

§ 127. *Inability to obtain consent of another.*—When a contract is entered into which requires the consent of a third person, and such consent cannot be obtained, specific performance will not be decreed.⁵ If, therefore, the wife's consent is necessary to the performance of a contract entered into by the husband, or husband and wife, and she refuses to give it, he will not be decreed to obtain his wife's consent ;⁶

¹ Walker v. Barnes, 3 Mad., 247. ² De Medina v. Norman, 9 M. & W., 820.

³ *Gt. Western R.R. Co. v. Birmingham & Oxford Junc. R.R. Co.*, 2 Phil., 597; *Hawkes v. Eastern Counties R.R. Co.*, 1 De G. M. & G., 756; *Devenish v. Brown*, 26 L. J. Ch., 23; *Frederick v. Coxwell*, 3 Y. & J., 514; *Mayor of Norwich v. Norfolk R.R. Co.*, 4 Ell. & Bl., 397.

⁴ *Hibbleshwaite v. M'Morine*, 5 M. & W., 462. The contrary seems to have been decided by Lord Macclesfield in *Cuddee v. Rutter*, 5 Vin. Abr., 538; Pl., 21.

⁵ *Howell v. George*, 1 Mad., 1; *Grey v. Hesketh*, Ambl., 268. And see *Marsh v. Milligan*, 3 Jur. N. S., 979; *Beeston v. Stutely*, Week. Rep., 1857-1858, 206.

⁶ *Bryan v. Wooley*, 1 Bro. P. C., 184; *Emery v. Wase*, 8 Ves., 505; *Frederick v. Coxwell*, 3 Y. & J., 514; *Martin v. Mitchell*, 2 J. & W., 413, 425; *Davis v. Jones*, 1 N. R., 269. In Iowa, where a husband agreed to convey lands in which there was a homestead right under the statute regulating "homesteads," and the wife did not join in the agreement, it was held that specific performance could not be decreed, the wife refusing to give her consent. *Yost v. Devault*, 9 Iowa, 60; *Barrett v. Mendenhall*, 42 Ib., 296. See *Long v. Brown*, 66 Ind., 160. Although a husband will not be decreed to procure his wife to join in the execution of a deed for the purpose of releasing her inchoate right of dower if she is unwilling to do so; yet, if the refusal of the wife is made in bad faith, or by the procurement of her husband merely to enable him to escape his just obligations, the court may decree a conveyance by the husband alone, and compel him to give indemnity by mortgage or otherwise against the claim of the wife. *Peeler v. Levy*, 26 N. J. Eq., 330. For a full discussion of this subject and citation of cases, see *post*, § 511. In several of the States the wife may now enter into contracts in relation to her own property, without the consent or joinder of her husband.

though it was formerly held otherwise.¹ Where, however, a father covenanted that his son, who was then under age, should convey lands to a purchaser, he was decreed to procure the son to convey, on the son coming of age.²

¹ *Barrington v. Horn*, 2 Eq. Cas. Abr., 17, Pl. 7; *Hall v. Hardy*, 3 P. Wms., 187; *Daniel v. Adams*, Ambli., 495; *Morris v. Stephenson*, 7 Ves., 474. "The court used formerly to decree the husband to procure his wife's consent, and in default, commit him to jail until she yielded. But the absurdity of such a course is obvious; because the court of chancery would be putting all the compulsion it could upon the wife to induce her to do an act of which the essence is that it is done without compulsion. The court of chancery would be distressing her to give her consent, whilst the court of common pleas is examining her to see that she is acting from free will alone; and it is accordingly now established, that the court will not interfere specifically to perform contracts where a wife's consent is requisite, and she refuses to give it." *Fry on Specif. Perform.*, 293. In *Hall v. Hardy*, 3 P. Wms., 187, it was stated by Sir Joseph Jekyll, Master of the Rolls, that there had been a hundred precedents, where, if the husband for a valuable consideration covenanted that the wife shall join with him in a fine, the court has decreed the husband to do it; for that he had undertaken it, and must lie by it. Subsequently, however, the doctrine was questioned, and in some of the cases denied. *Davis v. Jones*, 4 Bos. & Pull., 267; *Martin v. Mitchell*, 2 Jac. & Walk., 413. In *Emery v. Wase*, 8 Ves., 505, Lord Eldon said that the argument showed that the point was not so well settled as it had been understood to be. "The purchaser is bound to regard the policy of the law; and what right has he to complain, if she, who according to law cannot part with her property, but by her own free will expressed at the time of that act of record, takes advantage of the *locus pœnitentiæ*." And see 1 *Roper, Husb. & Wife*, 545, 547-8, note; *Bright's Husb. & Wife*, 191. In *Watts v. Kenney*, 3 Leigh., 272, *Tucker, J.*, said: "As to compelling a husband to procure a conveyance, the doctrine, never well received, has never been acted on with us, and seems recently to have been discountenanced in England." See remarks of Sir Thomas Plumer in *Martin v. Mitchell*, 2 J. & W., 425; and see *Frederick v. Coxwell*, *supra*. In England, it has been held that the court has no jurisdiction to make a peremptory order that a married woman shall execute a conveyance pursuant to a decree, and acknowledge it. *Jordan v. Jones*, 2 Phil., 170. In Pennsylvania, where a married woman executed a deed of property of which she held the legal title in trust by descent, and the law required her to acknowledge that she executed it voluntarily, and she refused, the court passed a decree compelling her to do so. *Dundas v. Biddle*, 2 Pa. St., 160. But in the same State, where the wife died before her conveyance was delivered, it was held that the land vested in her heirs, for the reason, that until delivery, she might revoke her assent, notwithstanding she had acknowledged the deed. *Leland's Appeal*, 13 Pa. St., 84. Had the deed been delivered in her lifetime as an escrow, a different case would have been presented. It was a matter of some consequence to the heirs; for if a conveyance had been decreed, the purchase money would have gone to the husband.

Where a person contracted for the sale of a lot of land, described as the "buck lot," and his wife joined in the contract, but did not acknowledge it, as required by the statute, and a deed was subsequently given duly executed by the husband and wife, of a lot numbered one hundred and twenty-three, the number of the "buck lot" being one hundred and three, it was held that, the wife having died before the discovery of the error in the deed, her infant heir could not be compelled to convey according to the contract. *Knowles v. McCamley*, 10 Paige Ch., 342.

² *Anon*, 2 Cha. Cas., 53.

But this decision would not now be regarded as authority.¹

§ 128. *Substantial performance*.—Equity, having regard to the substance, rather than to the form of contracts, will not allow the impossibility of a literal fulfilment to prevail as a defence, when the agreement can be substantially carried out so as to effectuate the intentions of the parties, and do entire justice between them.² Thus, where a man undertook to convey certain land, and there was no such land; the court compelled him to convey land of equal value.³ The following case was decided on the same principle: A party having entered into an agreement to build a bridge over the river Tyne, and to maintain it for seven years, for the sum of nine thousand pounds, and having given a bond in that sum for the performance of the contract, it was found that a bridge on that site could not be maintained. He thereupon brought a suit for relief from the bond, which was granted upon the terms of his building a bridge upon a neighboring site, where it could stand, and submitting to an issue of *quantum damnificatus* by the change of site.⁴ A bill for the specific performance of a contract, alleged that the defendants agreed to procure, within two years, the heir at law of A. B. to convey certain property to the plaintiffs, or, within the same period, to petition the House of Lords for, and to use their utmost endeavors to obtain, an act of Parliament for substituting a trustee in place of the heir, in case such heir could not be found. It was held, that although an agreement by a per-

¹ Howell v. George, 1 Mad., 4. See Evans v. Cogart, 2 P. Wms., 451.

² Shaw v. Livermore, 2 Green, Iowa, 338; Philadelphia, etc., R.R. Co. v. Lehigh, etc., Co., 36 Pa. St., 204. A court of equity will aid a vendee who shows a readiness to perform substantially his agreement, when it will not work injury to the other party. Hart v. Brand, 1 A. K. Marsh, 159. Where a purchaser of land stipulated to pay the taxes, but failed to do so, and allowed it to go to sale, he bidding it off himself, it was held a sufficient performance if no inequitable advantage was sought or intended from the sale; it being an indirect mode of paying the taxes. Oliver v. Crosswell, 42 Ill., 41.

³ Carey v. Stafford, 3 Swanst., 427, n.

⁴ Errington v. Aynesly, 2 Bro. C. C., 341. See Davis v. Hone, 2 Sch. & Lef., 351. See *post*, Book 4, Ch. 1.

son to use his utmost endeavors, could not be enforced, yet that the court would compel the defendants to permit their names to be used in an application to Parliament for the act.¹

§ 129. *Where contract invalid in form.*—Within the rule under consideration, when the contract, in the form in which it is drawn, is illegal, the court will enforce it in substance, if it can be lawfully performed in this way. Thus, where a contract providing that a tenant should pay the rent charge was illegal by statute, it was held that an agreement for a lease stipulating that the tenant should pay a certain sum for rent, and also the rent charge, might be enforced by means of a lease reserving as rent the two sums which in the agreement were treated respectively as rent and rent charge.² And the court will be likely to pursue a similar course in relation to a contract which, though originally lawful, has become unlawful in part by subsequent legislation. Accordingly, where a dean and chapter, previous to the disabling statute of 13 Eliz., covenanted for the renewal of a lease for ninety-nine years, and a suit was brought for a renewal for such term as the corporation could grant under the statute, it was held that the plaintiff was entitled to the relief prayed.³

¹ Frederick v. Coxwell, 3 Y. & J., 514. A railroad company agreed with A. for the sale of land required for its proposed line, he to withdraw his opposition, in consideration of twenty thousand pounds to be paid to him, in case the bill should become a law. There being a rival company which would require different land of A., the two companies agreed while the matter was before the committee of the House of Commons, that there should be a reference to determine which of the two lines should be constructed, and that the successful company should assume all the engagements of the other. The line of the second company having been approved, and a bill for specific performance filed by A., the defendant demurred on the ground that the payment of the twenty thousand pounds was conditional on the first-named company obtaining the passage of an act, and that the land required was not the same contracted for, but the demurrer was overruled. Stanley v. Chester & Birkenhead R.R. Co., 9 Sim., 264; S. C. 3, My. & Cr., 773. In a subsequent case, however, it was held that the passing of the bill of an amalgamated company, was not a ground for enforcing specific performance of an agreement which was to be binding if the bill of one of the companies passed. Greenhalgh v. Manchester & Birmingham R.R. Co., 9 Sim., 416; S. C. 3, My. & Cr., 784, affg. the decree, but on a different ground. See Earl of Lindsey v. Gt. Northern R.R. Co., 10 Hare, 664.

² Carolan v. Brabazon, 3 J. & L., 200.

³ Bettesworth v. Dean and Chapter of St. Paul, Sel. Cas. in Ch., 66.

§ 130. *Partial disability*.—Where the subject matter of the contract is divisible, and the disability of the defendant relates only to a portion of it, specific performance may be decreed as to that which is capable of being executed. Within this principle, if, under a contract for the sale of land, the vendor has no title to a portion of the land, the vendee may compel specific performance of the contract, so far as the vendor can perform it, and insist upon an abatement of the price as to the residue.¹

§ 131. *Inability to perform one of two alternatives*.—If a contract be, on the face of it, in the alternative, so as apparently to give the party an election, and one of the alternatives, at the time the agreement is made, is impossible or void, the right of election does not exist, and the party is bound to perform the other alternative.² Thus, where a bond was entered into for the payment of a certain sum, or the rendering in execution of a person who had previously been discharged, it was held that, as the latter alternative was illegal and void, the obligor must perform the other; and that, as he had not done it, the bond was forfeited.³ So, where an award directed that a sum of money should be paid or secured, but did not state what security was to be given, and a question arose whether the award was void for uncertainty, it was held that it was not, for the reason that if an award is in the alternative, and one of the alternatives is void or impossible, the party is bound to perform the other.⁴ It was laid down in an early case, that

¹ Rankin v. Maxwell, 2 A. K. Marsh, 488; Weatherford v. James, 2 Ala., 170; Jacobs v. Sale, 2 Ired. Eq., 286; Henry v. Liles, Ib., 407; Wright v. Young, 6 Wis., 127; Collins v. Smith, 1 Head. Tenn., 251; Bell v. Thompson, 34 Ala., 633; Ketchum v. Stout, 20 Ohio, 453; Covell v. Cole, 16 Mich., 223; Marshall v. Caldwell, 41 Cal., 611; *post*, § 505. Where several joint owners contracted with a person for the sale of land, and the purchaser brought a suit for specific performance against all of them, in which he failed to establish his claim to the whole of the land because the contract was not binding upon some of the owners, it was held that he was entitled to recover such portion of the land as was owned by those upon whom the contract was binding. Meek v. Walthall, 20 Ark., 648.

² Wigley v. Blacwal, Cro. Eliz., 780.

³ Da Costa v. Davis, 1 B. & P., 242.

⁴ Simmonds v. Swaine, 1 Taunt., 549.

“Where the condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the bond made, and afterward one of them becomes impossible by the act of God, the obligor is not bound to perform the other part.”¹ This statement of the principle is not, however, quite correct. For, although the thing agreed to be done cannot be literally carried out, in consequence of the death of a party, yet if it can be performed in substance, and that is consonant with the intention of the parties, it may be enforced. Thus, a father having agreed, on the marriage of his daughter, to leave to her, at his death, an equal portion with his other children, and the daughter having died in his lifetime, it was urged that he was thereby discharged from the agreement by act of God. But a demurrer to a bill by the husband, praying for an equal share in the father’s residuary estate, was overruled; the vice-chancellor remarking that the agreement might have been performed in either of two ways: by the father making provision for his daughter by will, or by his dying intestate; and that though the death of the daughter prevented him from performing it in the first way, he was not thereby released from performing it in the second.² Where

¹ *Laughter’s Case*, 5 Co. Rep., 21 B.; *S. C. Eaton’s Case*, Moore, 357; *Eaton v. Laughter*, Cro. Eliz., 398. See *Warner v. White*, T. Jon., 95. A father, on the marriage of his daughter, covenanted that by some act *inter vivos*, or by will, he would make provision for his daughter. Nothing, however, was done by the covenantor for his daughter, who died in his lifetime. The court of common pleas, on a case stated for its opinion by direction of Vice-Chancellor Wigram, held that the covenantee had no cause of action. “The vice-chancellor, though expressing an opinion that by this view the intention of the parties was disappointed, as the provision was intended to be absolute, and the mode of making it only intended to be left to the discretion of the covenantor, yet confirmed the certificate, and dismissed the bill with costs.” *Jones v. How*, 7 Hare, 267; 9 C. B., 1; *Fry on Specif. Perform.*, 299, 300.

² *Barkworth v. Young*, 4 Drew, 1. In this case, the vice-chancellor said that it was impossible to lay down any universal proposition, and that each case must depend upon the intention of the parties; but that where the intention was clear that one of the parties should do a certain thing, and he had an option to do it in one or other of two modes, and one of those modes became impossible by the act of God, he was bound to perform it in the other mode; and that in the case before the court, it was manifestly the intention of the parties that, in one way or other, the daughter should have an equal share of the testator’s property. A similar view has been taken in actions at law. In *Studholmes v. Mandell*, 1 Ld. Raym., 279; *Treby*, C. J., referred to a decision where a person entered into a

the party seeking specific performance has, by his own act or default, rendered the performance of one of the alternatives impossible, thereby depriving the defendant of his right of election, and in effect nullifying the agreement, the other alternative is discharged.¹ This obviously just principle is acted on at law, as well as in equity. Thus, in debt on a bond conditioned for the delivery up, by the defendant to the plaintiff, of certain obligations entered into by the plaintiff to the defendant, or for the execution to the plaintiff of such release of them as should be devised by the plaintiff's counsel before Michaelmas, a plea that neither the plaintiff nor his counsel devised any release before Michaelmas, was sustained by the Queen's Bench, on the ground that when the obligee deprives the obligor of the power to perform one part, the law discharges him from the other.² If one of two alternatives cannot be performed solely in consequence of the act of a stranger, the other alternative must be performed : as if a person should give a bond to convey certain land to another, or to marry A. B. by a day named, and a stranger married A. B. before the day, the obligor must convey the land ; but not if the obligee married A. B. before the day, for then the other alternative is discharged.³

bond either to make a lease for the life of the obligee before a certain day, or to pay one hundred pounds, and the obligee having died before the day, the court of common pleas held that the obligor should pay the one hundred pounds. In another case, in an action on a bond conditioned to pay or to secure to the plaintiff, or her children by William Ashe, her then intended husband, three thousand pounds within six months after the defendant should become Duke of Bolton, it was set up in defence, that William Ashe died childless, before the defendant became duke. But the plea was held bad, on the ground that it could never have been the intention of the parties that the money should not be paid to the plaintiff in case she should not have a child by William Ashe at the time the defendant became duke ; though if she then had a child, the defendant might have elected to whom to pay the money. *Drummond v. Duke of Bolton*, Say., 243. And see *More v. Morecomb*, Cro. Eliz., 864.

¹ Com. Dig. Condition, K. I.

² *Grrenningham v. Ewer*, Cro. Eliz., 539.

³ *Ibid.*

CHAPTER II.

NON-CONCLUSION OF CONTRACT.

- 132. Existence of contract an important subject of inquiry.
- 133. What essential to constitute a contract.
- 134. No liability incurred by mere proposition.
- 135. Requisites of acceptance.
- 136. Where acceptance changes terms of offer.
- 137. When offer and acceptance amount to agreement.
- 138. At what time agreement is complete.
- 139. Effect of representation influencing conduct of party.
- 140. Promise to entitle party to relief must have been positive.

§ 132. *Existence of contract essential.*—The defendant may insist that no definite and binding terms were arrived at by the parties, but that what transpired between them amounted to nothing final. This position, if sustained, will, of course, be fatal to the relief prayed. For if there has not been a reciprocal and mutual assent to what is sought to be enforced, the plaintiff can have no claim upon the interposition of the court. It therefore becomes a subject of inquiry, where the absence of any agreement is set up in defence, whether what has transpired amounts to a contract, or only to a negotiation looking to that end, but not resulting in anything determinate. When the arrangement is reduced to a formal written instrument, which is signed by the parties, no difficulty can arise in judging of its character. But it may be otherwise, when the alleged agreement is sought to be derived from conversations or letters.¹ Unless it is entirely clear that a contract was concluded, specific

¹ "Care should be taken not to construe as an agreement, letters which the parties intended only as a preliminary negotiation. The question in such cases always is, Did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound?" Foster, J., in *Lyman v. Robinson*, 14 Allen, 254. And see *Brown v. N. Y. Centr. R.R. Co.*, 44 N. Y., 79.

performance will not be decreed; but the court will leave the parties to their rights at law.¹

§ 133. *Distinction between an offer and an agreement.*—The principles governing this subject are extremely simple; the only question being, whether, at the time of the alleged agreement, the minds of the parties had come together in actual assent. A contract capable of being specifically enforced, may be made by a proposition, either verbal or written, on the part of one person, and the acceptance of it by the one to whom it is made; but not by an acceptance by a third person to whom the offer was not made.² It is scarcely necessary to say that there is an important distinction between a memorandum of offer, which is the act of only one party, and a memorandum of agreement, which is the act of both. “In the case of an offer, the party signing it may at any time before acceptance retract. But if it be an agreement, though signed by one party alone, he cannot retract at his pleasure; but all he can do is to call upon the other party to sign or rescind the agreement. A memorandum of agreement supposes that the two parties have verbally made an actual contract with each other; and when the terms of such contract are reduced to writing and signed, that is sufficient to bind the party signing. But in the memorandum of an offer only, that assumes that there has been no actual contract between the parties.”³

¹ Huddleston v. Briscoe, 11 Ves., 583; Stratford v. Bosworth, 2 V. & B., 341. Where a party agreed to accept the lease of a dwelling-house in London “to contain all usual covenants and provisoes,” and the lease contained a covenant not to assign without the lessor’s consent, it was held that it was not a “usual covenant,” and that the agreement could not be enforced. Hampshire v. Wickens, L. R. 7, Ch. D. 555, disapproving Haines v. Burnett, 27 Beav., 500. As an agreement can only be constituted by the act of parties intending and consenting to contract, an arrangement which, though apparently formal and complete, is understood by the parties as a mere jest, is not binding. The term agreement is usually employed in a more restricted sense than contract; the latter comprising every species of obligation whereby a person binds himself to do, or omit to do, some act, while the former is seldom used except in relation to contracts not under seal, and imports a reciprocity of obligation. This distinction is, however, practically unimportant. See Wain v. Warlters, 5 East., 16; Saunders v. Wakefield, 4 B. & Ald., 595; Egerton v. Mathews, 6 East., 308.

² Meynell v. Surtees, 3 Sm. & Gif., 101, 117.

³ Kindersley v. C. in Warner v. Willington, 3 Drew, 523. And see Horsfall v. Garnett, Week. R., 1857–1858, 387. When instructions are given to a real estate

§ 134. *Right to withdraw offer*.—A party incurs no responsibility by a mere proposition which is not accepted; an offer in itself creating no mutuality and no obligation.¹ The proposal may be withdrawn by the person making it, either expressly by a formal notice, or impliedly by some act inconsistent with it, without alleging any reason; or it may be terminated by the party to whom it is made declining it, or delaying for an unreasonable time to return a definite answer. Where a person makes an offer for the purchase of land, which the owner of the land intends to accept, but does not do it, and the proposal is withdrawn, there is no contract.² The offer may be withdrawn at any time before acceptance, notwithstanding it specifies a definite period within which the other party may reply.³ When the person to whom the proposition is made declines it, it will not be revived by a subsequent offer of acceptance; such an act depriving the party of the right to avail himself of the original offer.⁴ But either party, until withdrawal or acceptance, may, of course, vary or add to the proposed stipulations. Where the owner of an estate in an offer of sale proposed, among other conditions, the payment of fifteen hundred pounds by way of deposit, to

agent to find a purchaser of land, and he is not instructed as to the conditions to be inserted in the contract, he is not authorized to sign a contract. *Hamer v. Sharp*, L. R. 19, Eq. 108.

¹ *Thornbury v. Beville*, 1 Y. & C. C. C., 554; *Tucker v. Wood*, 12 Johns., 170; *Bower v. Blessing*, 1 Serg. & Rawle, 243; *Canal Co. v. R.R. Co.*, 4 Gill & Johns., 1. Pothier says: "A contract includes a concurrence of intention in two parties, one of whom promises something to the other, who, on his part, accepts such promise. . . . Now, as I cannot by the mere act of my own mind transfer to another a right in my goods without a concurrent intention on his part to accept them, neither can I by my promise confer a right against my person until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right." *Poth. on Ob. Pt. 1, C. 1, S. 1, Art. 2*. See *Johnston v. Fessler*, 7 Watts, 48; *Eskridge v. Glover*, 5 Stew. & Port., 264; *McKinley v. Watkins*, 13 Ill., 140; *Cope v. Albinson*, 16 Eng. L. & Eq., 476.

² *Warner v. Willington*, *supra*.

³ *Routledge v. Grant*, 4 Bing., 653; *Cooke v. Oxley*, 3 T. R., 653; *Larmon v. Jordan*, 56 Ill., 204; *Mayer v. U. S.*, 5 Ct. of Cl., 317; *Boston & Maine R.R. v. Bartlett*, 3 Cush., 224.

⁴ *Hyde v. Wrench*, 3 Beav., 334. *Contra*, *Hodgson v. Hutchinson*, 5 Vin. Abr., 522, Pl. 34. A refusal to accept need not be proved; it is sufficient that there is no evidence of acceptance. *Corning v. Colt*, 5 Wend., 253.

which the other party objected, and the owner then required that the agreement should be signed before a day named, which was not done, but an offer was subsequently made to sign the agreement and pay the deposit, it was held that there was no contract.¹ It may be denied that the alleged offer was really made. Where a person writes to the owner of land inquiring the price, the reply of the latter stating the price does not constitute a proposition to sell.² So, the construction of the offer may be the subject of controversy on the question of the conclusion or non-conclusion of a contract.³

§ 135. *What required to constitute an acceptance.*—If there is a simple acceptance of an offer to purchase accompanied by a statement that the acceptor desires that the arrangement should be put into some formal terms, the mere reference to such a proposal will not prevent the court from enforcing the final agreement so arrived at.⁴ The plaintiff wrote to the defendant's agent: "In reference to J.'s property on Fleet Street, I think eight hundred pounds for the lease, fixtures,

¹ *Honeyman v. Marryat*, 21 Beav., 14; Affd. 6, House of Lds., 112.

² *Knight v. Cooley*, 34 Iowa, 218. See *Erwin v. Erwin*, 25 Ala., 236.

³ In a suit for specific performance, the averments in the petition were, that the plaintiff, a married woman, occupying certain premises belonging to the defendant, made a written proposition to him to purchase the same, and to pay defendant's agent twenty-five hundred dollars therefor—fifteen hundred dollars to be paid in cash and the remaining one thousand dollars in one year, to be secured by a mortgage on the premises. The defendant replied that he would sell the property for three thousand dollars—fifteen hundred dollars to be paid to his agent immediately, and the balance to be paid in two yearly instalments of seven hundred and fifty dollars each, with a mortgage on the premises to secure such payments; and that, if she accepted his offer, to inform him of the fact and he would send a deed or power of attorney to his agent, and authorize him to arrange the whole affair. The plaintiff at once wrote back that she accepted the defendant's terms, and that she would pay to his agent the fifteen hundred dollars as soon as the deed was ready, and at the same time execute the mortgage. Held, overruling a demurrer to the petition, that the word "immediately" in the defendant's proposition simply meant that the first payment should be cash, to be made at the time the deed was delivered and mortgage executed. *Bruner v. Wheaton*, 46 Mo., 363.

⁴ *Crossley v. Maycock*, L. R. 18, Eq. 180. Where the plaintiff stipulated in writing to take from the defendant the lease of a house for a term mentioned at a specified rent, "subject to the preparation and approval of a formal contract," it was held that, in the absence of any other contract, there was no final agreement of which specific performance could be decreed. *Winn v. Bull*, L. R. 7, Ch. D. 29.

etc., is about what I should be willing to give. Possession to be given me within fourteen days from date. This offer is made subject to the conditions of the lease being modified to my solicitor's satisfaction." Soon afterward the agent wrote in reply: "We are instructed to accept your offer of eight hundred pounds for these premises, and have asked J.'s solicitor to prepare a contract." The modification required in the lease was obtained. It was held that the mere reference to the preparation of an agreement, by which the terms agreed upon would be put into a more formal shape, did not prevent the two letters from constituting a complete contract.¹ But an acceptance to be binding must be distinct, unconditional, and not vary the terms of the offer, and be communicated to the other party without unreasonable delay.² A moment's reflection will show that these requirements are reasonable, just, and fundamental. An ambiguous answer might be susceptible of different interpretations, and require explanation, thereby leaving the negotiation open instead of terminating it; and an acceptance with a qualification or condition would require the assent of the party making the offer. So the offer must be acted on promptly, if at all, that being implied from the nature of the transaction.³ Where it appeared that although there had

¹ *Bonnewell v. Jenkins*, L. R. 8, Ch. D. 70. A. wrote to B., offering to sell him property for thirty-seven thousand five hundred pounds, or a part of it for less, and added a postscript reserving the right to remove the materials of a house. B. replied: "I beg to acknowledge the receipt of your letter stating that you are willing to accept thirty-seven thousand five hundred pounds for your land at N. I hereby accept your terms as above, and agree to pay you the said sum of thirty-seven thousand five hundred pounds for your land." It was held that this was an acceptance of the terms of A.'s letter, including the postscript. *Hussey v. Hornepayne*, L. R. 8, Ch. D. 670.

² *Thornbury v. Beville*, 1 Y. & C. C. C., 554; *Eads v. Carandolet*, 42 Mo., 113; *Bruner v. Wheaton*, *supra*; *Bethel v. Hawkins*, 21 La. An., 620; *Wilson v. Clements*, 3 Mass., 1; *Peru v. Turner*, 10 Me., 185; *Johnston v. Fessler*, 7 Watts, 48; *Hazard v. New England Mar. Ins. Co.*, 1 Sumner, 218; *Carr v. Duvall*, 14 Pet., 77; *Hartford & New Haven R.R. Co. v. Jackson*, 24 Conn., 514; *Solomon v. Webster*, 4 Colorado, 353; *Carter v. Shorter*, 57 Ala., 253.

³ "When I offer anything to a person, what I mean is, I will do that, if you choose to assent to it; meaning, although it is not so expressed, if you choose to assent to it in a reasonable time." Lord Cranworth in *Meynell v. Surtees*, 1 Jur. N. S., 737. In 1827 the defendant wrote to the plaintiff that he had credited the account of the latter with two hundred and twenty pounds, in consideration of

been a long correspondence between the parties, yet that there had never been in any part of it a distinct acquiescence on both sides in one and the same set of terms, it was decreed that the bill should be dismissed unless the plaintiff accepted the terms of the defendant's original offer, which was done.' A. wrote to B. offering to sell him certain land. B. brought a suit against A., alleging an agreement in writing for the sale of the land, and A., in his answer, offered to sell the land. The decree was in the alternative, for a conveyance on the payment of the purchase money into the bank, or, in default, that the bill be dismissed. The money having been paid, a question arose between the heirs and devisees of B. as to the time the contract was concluded. It was held that the bill did not constitute an acceptance so as to bind B., as he might have dismissed the bill; that the decree did not, for it left an election to the plaintiff; but that the payment of the money into the bank did, that being unequivocal.' A. having made a proposition to B. to take the lease of a farm, and having given B. the names of certain persons as references, the agents of B., by his direction, prepared and sent to A. a lease which they regarded as conforming to A.'s offer. It was held that this did not constitute an acceptance, for the reason that the act was ambiguous and conditional; ambiguous, because the lease might have been forwarded to save time, and without any intention to relinquish the right to accept or reject A.'s offer; and conditional, because the sending of the draft

an agreement by the plaintiff to convey certain houses. The abstract was delivered; but there was no acceptance in writing by the plaintiff, who, however, five years subsequently brought a suit for specific performance. It appeared that in 1827 the defendant had broken off the negotiation, and that, two years later, both parties regarded it as abandoned; but that the plaintiff had, in the meantime, had the benefit of the credit of two hundred and twenty pounds. The bill was dismissed, on the ground that an offer to convert the negotiation into a contract must be acted on within a reasonable time. *Williams v. Williams*, 17 Beav., 213.

¹ *Thomas v. Blackman*, 1 Coll. C. C., 301. See *Crane v. Roberts*, 5 Me., 419; *Eliason v. Henshaw*, 4 Wheat., 225; *Glaxmaker v. Sawin*, 4 Ib., 369.

² *Gaskarth v. Lord Lowther*, 12 Ves., 107; *Fry on Specif. Perform.*, 76, 77.

lease, if an acceptance, was upon condition that the defendant accepted the draft lease.¹

§ 136. *Acceptance with qualification.*—A few examples will suffice to illustrate the very obvious proposition, that when the acceptance changes the terms of the offer, there is no contract: as where A. offered to purchase of B. the lease of a house, possession to be given on or before the twenty-fifth of July, and a definite answer within six weeks, and B. replied that he would sell on the terms proposed, and give possession on the first of August, and A. afterward, and before the six weeks had expired, retracted his offer;² or where the owner of land made the promoters of a railroad an offer for a right of way for mineral traffic only, which was accepted for the purpose of constructing a railroad for general traffic;³ or where the defendant made a proposition for a lease, and the plaintiff accepted the terms proposed, but offered an under-lease.⁴ So, when a condition is introduced in the acceptance, the proposed agreement is still in abeyance.⁵ In a suit for the specific performance of a contract for the sale of land, it appeared that the defendants had written to the plaintiffs, offering to purchase, to which the plaintiffs replied as follows: "We are in receipt of your note offering two pounds per yard for the plot of land, which offer we accept, and now hand you two copies of conditions of sale, which we have signed. We will thank you to sign same, and return one of the copies to us." The conditions of sale here referred to were very special. It was held that there was no final contract.⁶ A. sent by telegram to B. an offer of twelve hundred pounds for the purchase of certain real estate. B. telegraphed back: "Accept your offer of twelve hundred pounds subject to

¹ Warner v. Willington, 3 Drew, 523. And see Horsfall v. Garnett, Week. R., 1857-1858, 387.

² Routledge v. Grant, 4 Bing., 653.

³ Meynell v. Surtees, 3 Sm. & Gif., 101, affd. 1, Jur. N. S., 737.

⁴ Holland v. Eyre, 2 Sim. & Stu., 194.

⁵ Hall v. Hall, 12 Beav., 414.

⁶ Crossley v. Maycock, L. R. 18, Eq. 180.

letter and agreement, to be sent to your solicitor." A draft contract of sale was afterward furnished to the purchaser's solicitor, but, owing to a disagreement as to details, the negotiation was broken off by B. In a suit by A. for specific performance, it was contended in his behalf that the words "subject to letter and agreement," simply meant that a formal contract for the carrying out of the agreement would be sent. But the court held that there was no concluded contract between the parties, and a demurrer to the bill was allowed with costs.¹ The defendant offered by letter to sell certain property to the plaintiff, which offer the plaintiff accepted by letter, subject to the title being approved "by my solicitor." Afterward the plaintiff wrote to say that he must abandon the purchase unless he was allowed to pay the money by instalments, to which the defendant assented. It was held on appeal that the words "subject to the title being approved by my solicitor," were not merely an expression of what would be implied by law, but constituted a new term; that the plaintiff's letter was not therefore an acceptance, but a new offer which had never been accepted, and that there was no binding contract.² A. made a proposition to B. stipulating, among other things, that a lease should contain all the covenants in the superior lease. B. signed the agreement, which was tendered, but with the qualification that there was nothing unusual in such superior lease. A draft of the proposed lease was then sent to B., who made some alterations in it, and requested A.'s solicitors to adopt them at once or to refuse the lease. The solicitors returned the lease, acquiescing in all the alterations except one, as to assigning without license. It was held that; up to this time, there was no contract, and that B. was at liberty to break off the negotiation.³ And where a proposition was made to take an

¹ Brien v. Swainson, L. R. Ir. Ch. D., 135.

² Hussey v. Hornepayne, L. R. 8, Ch. D. 670.

³ Lucas v. James, 7 Hare, 410.

allotment of railway shares, and a letter was sent back accepting the offer, but headed "not transferable," it was held that the new term thereby introduced, postponed the conclusion of the contract.¹ So, where the plaintiff wrote to the provisional committee of a railroad company for sixty shares, undertaking, in the form prescribed by the prospectus, to accept the same subject to the regulations of the company, and to pay the deposit thereon when required, and the committee wrote back that they had allotted the plaintiff sixty shares upon condition that the deposit was to be paid on or before a certain day, "in default of which the allotment would be forfeited," it was held that there was no contract, there not having been a simple acceptance of the plaintiff's proposal.²

§ 137. *Acceptance when binding.*—When the offer submits the decision of some matter connected with the transaction to the party to whom the offer is made, an acceptance making the decision will constitute a contract:³ as where the offer leaves the day to be named by the other party, and he in accepting names the day;⁴ or the proposal and acceptance may leave the price or any other term to be ascertained in a way agreed.⁵ A variation in the acceptance which is nugatory will not affect the contract: as a mere expression of hope;⁶ nor, as we have seen, an allu-

¹ Duke v. Andrews, 2 Exch., 290.

² Wontner v. Shairp, 4 C. B., 404.

³ Boys v. Ayerst, 6 Mad., 316.

⁴ Walker v. Eastern Counties R.R. Co., 6 Hare, 594.

⁵ Lucas v. James, *supra*.

⁶ Clive v. Beaumont, 1 De G. & Sm., 397. And see Johnson v. King, 2 Bing., 270. A. wrote to B., offering to purchase certain land of him, and stated how he could make the payments. B. replied accepting A.'s proposal, but said that he wished A. to take the responsibility of establishing the boundaries, and requested A.'s answer as soon as possible. A. wrote back that he would take the land, and would have the boundaries ascertained; but desired that the agent of B. might attend to the fixing of the line on one side. Held that the contract of sale was complete. Fitzhugh v. Jones, 6 Munf., 83. In another case, the defendant in a letter to the plaintiff's agent proposed to purchase a plantation at eight thousand dollars, six thousand dollars in cash, and two thousand dollars in January following, and requested an immediate answer. The agent, by return post, replied accepting the proposal, but added that he presumed the two thousand dollars were to bear interest from date. Held that there was a binding contract, and that the suggestion in the letter of acceptance as to interest did not constitute a new term. Neufville v. Stuart, 1 Hill's S. S. C. Ch., 159.

sion in the acceptance to the manner in which the contract is to be carried out : as by referring to a formal agreement which is to be drawn.¹ As a writing signed by the party to be charged is sufficient within the statute of frauds, it follows that where the offer embraces the whole of the proposed contract so that a simple assent is required, a parol acceptance may constitute an agreement binding on the party making the offer.² So, where the proposition is made by the defendant, the plaintiff is not required to prove acceptance, the filing of the bill being *prima facie* evidence of acceptance, capable of being rebutted by proof on the part of the defendant, that the treaty had previously been determined.³ The acts of a person may be evidence of assent amounting to an acceptance which will bind the party making the offer.⁴ But mentally concluding to accept an offer, without indicating such determination by word or act, will not constitute a contract.⁵ An agreement may be consummated by an offer and acceptance by telegraph.⁶

§ 138. *Time of conclusion of contract.*—A question sometimes arises as to the time the negotiation culminates in a contract. The contract is complete when the answer containing the acceptance of a distinct proposition is despatched by mail, if it be done with due diligence after the receipt of the letter containing the proposal, and before any intimation is received that the offer is withdrawn.⁷

¹ Gibbins v. Northeastern Metrop. Dist. Asylum, 11 Beav., 1; Skinner v. M'Douall, 2 De G. & Sm., 265; *ante*, § 135.

² Boys v. Ayerst, *supra*; Warner v. Willington, 3 Drew, 523; Coleman v. Upcot, 5 Vin. Abr., 527, Pl. 17; Palmer v. Scott, 1 R. & M., 391. *Contra*, Lane v. McLaughlin, 14 Minn., 72. Where an offer made by letter is verbally rejected, the writer of the letter is released from his offer, unless he consent to renew the negotiation. Sheffield Canal Co. v. Sheffield, etc., R.R. Co., 3 R.R. Cas., 121.

³ Boys v. Ayerst, 6 Mad., 316.

⁴ Parker v. Serjeant, Finch, 146.

⁵ Frith v. Lawrence, 1 Paige, Ch., 434; White v. Corlies, 40 N. Y., 467.

⁶ Duple v. Batts, 38 Texas, 312; Wells v. Milwaukee, etc., R.R. Co., 30 Wis., 605.

⁷ Adams v. Lindsell, 1 B. & A., 681; Mactier v. Frith, 6 Wend., 103; Levy v. Coke, 4 Ga., 1; Brisban v. Boyd, 4 Paige Ch., 17; Averill v. Hedge, 12 Conn., 424; Hamilton v. Lycoming Ins. Co., 5 Pa. St., 339; Abbott v. Shepard, 48 N. H., 14; Stockham v. Stockham, 32 Md., 196; Chicago, etc., R.R. Co. v. Dane, 43 N. Y., 240; Potts v. Whitehead, 20 N. J. Eq., 55; 2 Kent's Com., 9th Ed., 640.

The contract therefore dates from the posting, and not from the receipt of the letter of acceptance.¹ An agreement to do a certain thing on demand is completed when the demand is made.² The communication of the acceptance to the agent of the person making the offer is sufficient, although the agent does not make it known to his principal.³

¹ *Potter v. Saunders*, 6 Hare, 1; *Busban v. Boyd*, 4 Paige Ch., 17; *Vassar v. Camp*, 11 N. Y., 441; *Clark v. Dales*, 20 Barb., 42; *Falls v. Gaither*, 9 Porter, 605; *Chiles v. Nelson*, 7 Dana, 281; *Levy v. Coke*, 4 Ga., 1; *Averill v. Hedge*, 12 Conn., 424; *Beckwith v. Cheever*, 21 N. H., 41. *Contra*, *McCulloch v. Eagle Ins. Co.*, 1 Pick., 278; *Thayer v. Middlesex Fire Ins. Co.*, 10 Ib., 326; *Gillespie v. Edmonston*, 11 Humph., 553. In *Mactier v. Frith*, *supra*, the joint owner of a cargo of brandy in course of shipment from France wrote, on the 24th of December, from St. Domingo, to the other owner in New York, proposing that the latter should take the cargo on his sole account; to which he replied that he would reserve his decision until he again heard from the party making the offer. On the 7th of March the owner in St. Domingo acknowledged the receipt of the answer to his letter, and on the 28th of the same month wrote again, reiterating the offer made in December. On the 25th of March the owner in New York, after the arrival of the brandy, wrote to the owner in St. Domingo that he had made up his mind to accept the offer, and that he had credited his correspondent with the invoice. It was held that the acceptance on the 25th of March completed the contract, although the letters of the 25th and 28th of March did not reach their destination until after the death of the owner in New York, which occurred on the 10th of April. "The better opinion of jurists is," says Mr. Kent (2 Com., 477, *note*), "that as soon as an offer by letter is accepted the contract is complete, although the acceptance had not been communicated to the party by whom the offer was made, provided the party making the offer was alive when the offer was accepted." The case of *McCulloch v. Eagle Ins. Co.*, *supra*, which is directly opposed to this view and to current authority, was substantially as follows: The plaintiff having written to the defendants on the 27th of December, inquiring on what terms they would insure his vessel and cargo, the defendants on the 1st of January wrote in reply that they would do so at a percentage named. The letter of the defendants was received by the plaintiff on the 3d of January, and on the same day he mailed a reply, asking the defendants to fill out a policy on the terms they had offered. Meanwhile, the defendants, on the 2d of January, had written to the plaintiff withdrawing their proposal; but this letter was not received by the plaintiff until after he had mailed his letter of the 3d of January. The vessel having been lost, it was held that there was no insurance. Parker, C. J., who delivered the opinion of the court, said that "the offer did not bind the plaintiff until it was accepted, and it could not be accepted to the knowledge of the defendants until the letter announcing the acceptance was received, or at most until the regular time for its arrival by mail had elapsed."

² *Beatson v. Nicholson*, 6 Jur., 620.

³ *Wright v. Bigg*, 15 Beav., 592. The owner of land having written a letter to his agent containing a proposition to sell the land to B., it was held that B. might send a written acceptance directly to the writer of the letter. And where B., after showing his reply to the agent, and telling him that he had accepted the proposition, sent the letter containing it by the agent to the post-office, it was held that the contract was complete from the time B.'s letter was delivered into the post-office. *Bryant v. Boone*, 55 Ga., 438.

§ 139. *When representation will constitute contract.*—An offer and acceptance may consist of a promise or representation made by one party for the purpose of influencing the conduct of the other party, and acts done by the latter on the faith of the same.¹ A representation may be of something past, present, or future. When a thing is falsely alleged to be an existing fact, and the person making the representation knows it to be false, or does not know that it is true, and another is thereby induced to act to his prejudice, the former will not be permitted to deny the alleged fact, either at law or in equity.² Accordingly, where a person, in a treaty of marriage with his daughter, told the suitor that a certain demand was not then existing, he was restrained by injunction from bringing an action to recover the demand.³ And where a father represented to a person who proposed to marry his daughter, that, after the death of her parents, she would be entitled to ten thousand pounds, when in fact it was only about half that sum, it was held the balance might be recovered from the father's estate.⁴ Cases of the misrepresentation of facts as existing, or past, do not rest in contract, but are decided on the principle of preventing fraud, or on that of equitable estoppel. Where, however, a representation of something to be done in the future is made for a special purpose, and another acts on the faith and in consequence of it, it constitutes a contract. "There is no middle term between a representation so made, to be effective for such a purpose, and a contract; they are identical."⁵ Where a writing was signed by a lady, reciting that she intended to

¹ *Hammersley v. Du Biel*, 12 Cl. & Fin., 62, *note*. See *Ayliffe v. Tracy*, 2 P. Wms., 64.

² *Montefiori v. Montefiori*, 1 W. Blk., 364. See *post*, § 305.

³ *Neville v. Wilkinson*, 1 Bro. C. C., 543. See *Gale v. Lindo*, 1 Vern., 475; *Scott v. Scott*, 1 Cox, 366; *Gregg v. Wells*, 10 A. & E., 90; *Freeman v. Cooke*, 2 Exch., 654; *Howard v. Hudson*, 2 Ell. & Bl., 1; *Foster v. Mentor Life Ass. Co.*, 3 Ib. 48.

⁴ *Bold v. Hutchinson*, 20 Beav., 250; *Affid.* 5 De G. M. & G., 558. See also, *Jameson v. Stein*, 21 Ib., 5.

⁵ Lord Cranworth in *Money v. Jorden*, 2 De G. M. & G., 332.

leave her granddaughter a certain sum to be secured by bond, and the contents of the writing were to be communicated to the intended husband of the granddaughter, which was done, it was held to constitute a contract capable of being enforced; the mention of the bond going to show that it was meant the proposal should be binding on the party making it.¹ So, where a father, in written proposals made in a treaty of marriage, expressed his intention to leave by will to his daughter, ten thousand pounds, to be settled on her and her children, and that the will would direct what disposition should be made of the bequest in case she died without issue, it was held to create an obligation; that although the proposals were made subject to revision, yet that that power was determined by their acceptance by the intended husband, and his marriage with the father's consent.²

§ 140. *Promise to be binding must have been unequivocal.*—In concluding this head, it is scarcely necessary to say, that to entitle a person who has acted on the faith of another's representations, to relief on the ground of contract, the alleged promise on which he relied must have been distinct and absolute. The mere expression of what the party may probably do is not sufficient, as it leaves the matter open for further consideration and change of purpose. Where a father, after stating that he should not enter into a settlement, said that he would allow his daughter the interest on two thousand pounds, and that if she married he might bind himself to do it, and pay the principal at his decease, it was held not to amount to an agreement.³ So, when the person making the representation declines to enter into a contract, and insists that the other party shall rely on his word, as the arrangement is merely of an honorary nature, it cannot be enforced.⁴ The following case was decided on

¹ Saunders v. Cramer, 3 Dr. & W., 87.

² Du Biel v. Thompson, 3 Beav., 469; Affd. 12 Cl. & Fin., 61, n. And see Montgomery v. Reilly, 1 Bli. N. S., 364; 1 Dow. N. S., 62.

³ Randall v. Morgan, 12 Ves., 67.

⁴ Walpole v. Orford, 3 Ves., 402.

this principle : A. having given a bond to B. for the payment of a sum of money, and being about to marry, B. told him she should never distress him about the bond, that she had given it up and should never enforce it. But on being asked to surrender the bond she declined to do so, saying that she would be trusted, and that A. might rely on her word. A suit having been brought on the bond by B. after A.'s marriage, he applied to the court for an injunction. The representations of B. were at first held binding ; but on appeal, it was determined otherwise by a divided court.¹ So, where a settlement not being ready, the marriage took place on the gentleman's assurance that the lady should have the same advantage as if the understanding were in writing duly executed, the court refused to interfere, the engagement being merely honorary.² And the same was held, where a landlord wrote to his tenant giving him a general assurance that if he acted to the satisfaction of the writer, the latter would deal honorably and handsomely with him in regard to renewing his lease.³

¹ *Money v. Jorden*, 15 Beav., 372 ; 2 De G. M. & G., 318 ; 5 House of Lds., 185. And see *Maunsell v. White*, 1 John & L., 539 ; Affd. 4 H. of Lds., 1039.

² *Viscountess Montacute v. Maxwell*, 1 P. Wms., 618.

³ *Price v. Asheton*, 1 Y. & C. Ex., 441. A father having made his will, in which he left twelve thousand five hundred pounds to his daughter, wrote to a friend of his in India, to whom the daughter was sent, that if she married to suit him, her husband should have two thousand pounds on the marriage, and added : "Nor will that be all. She is and shall be noticed in my will ; but to what further amount I cannot precisely say, owing to the present reduced and reducing state of interest, which puts it out of my power to determine at present what I may have to dispose of." The substance of the foregoing was communicated to the intended husband. The testator revoked his will, and made another, leaving out the legacy, and giving his daughter a residuary and contingent interest. It was held that there was no contract. *Morehouse v. Colvin*, 15 Beav., 341.

CHAPTER III.

INCOMPLETENESS, UNCERTAINTY, AND UNFAIRNESS OF CONTRACT.

- 141. Incomplete contract incapable of being specifically enforced.
- 142. Exceptions to rule as to incompleteness of contract.
- 143. Contract incomplete as to time.
- 144. Definiteness required as to subject matter.
- 145. Names of parties essential.
- 146. Price must be stated.
- 147. Materiality of mode agreed on for fixing price.
- 148. Price ascertained, when mode of fixing it not of essence of contract.
- 149. Court cannot adopt omitted details which the law does not supply.
- 150. Terms supplied by legal presumption.
- 151. Term, whether implied or expressed, may be rebutted or waived.
- 152. Contract must be certain.
- 153. Contracts enforced though ambiguous.
- 154. Property to be conveyed, must be described with certainty.
- 155. Person to whom conveyance is to be made must be designated.
- 156. Examples of uncertain contracts.
- 157. Contract must not be contradictory, or contain two different agreements.
- 158. Unfair contract not specifically enforced.
- 159. What to be considered with reference to fairness of contract.
- 160. Omission of material term through haste or inadvertence.
- 161. Improper suppression of material fact without fraud.
- 162. Contract entered into by person under the influence of spirituous liquor.
- 163. Rights of third persons regarded.
- 164. Contracts for sale made by trustees in breach of trust.
- 165. Contract fair in its inception, not rendered unfair by subsequent unforeseen events.
- 166. Contracts in settlement of doubtful rights.
- 167. Where contract depends upon events to be afterward made certain.

§ 141. *Will constitute a defence that agreement not consummated.*—If an alleged contract is incomplete in any of its material terms, it does not, of course, fully represent the intention of the parties. Such an instrument may, in a given case, even convey an incorrect idea of their intention, and consequently lack an essential ingredient of every binding agreement. A contract is incomplete when any part of it remains to be settled by negotiation.¹ The result is the same when, notwithstanding the terms of the agreement are settled, some act is omitted which is necessary to be done

¹ Potts v. Whitehead, 20 N. J. Eq., 55 ; Myers v. Forbes, 24 Md., 598.

in order to show the final assent of one of the parties. As a general rule, specific performance of an incomplete contract will not be decreed when objected to on that ground.¹ Where land commissioners, being authorized by city ordinance to sell a certain lot of land subject to the approval of the mayor, advertised it for sale, and received an offer from a person which they voted to accept, upon which vote the mayor endorsed his approval, and a deed was prepared, but never signed, it was held that there was no contract capable of being specifically enforced.² "The vote, although approved by the mayor, did not import a contract. It was to be communicated to the proper officers of the city as an authority to them to execute a deed, and it contemplated the deed as the only contract which the city was to make with the plaintiff. It was thus a mere preliminary to the completion of the contract."³

§ 142. *When incomplete contract may be enforced.*—An exception to the above-mentioned rule, arises where the contract has been so far performed by the plaintiff that the

¹ Hopkins v. Gilman, 22 Wis., 476; Madox v. McQuean, 3 A. K. Marsh, 400; Ohio v. Baum, 6 Ohio, 383; Southern Ins. Co. v. Cole, 4 Fla., 359; Hammer v. McEldowney, 46 Pa. St., 334; McKibbin v. Brown, 14 N. J. Eq., 13. A contract by an insurance company to issue a policy of insurance, must be fully consummated, or equity will not compel specific performance. Neville v. Merchant's Ins. Co., 19 Ohio, 452. A mere understanding between husband and wife, that land bought by the husband in the wife's name, should, in certain contingencies, revert to him, is not sufficiently definite to be specifically enforced. There should be a definite agreement to convey. Johnson v. Johnson, 16 Minn., 512. In the foregoing case, the complaint alleged that the conveyance was made to the wife for the sole purpose, by her understood and assented to, of providing a home for her in case she should survive her husband, and that it was always mutually understood between plaintiff and his wife, that, in case he should survive her, the title to the premises should vest in him, and should not descend to her heirs; that it was the intention of her and the plaintiff to have had prepared and duly executed the necessary and proper instrument in writing, to effect the purpose aforesaid, but, through inadvertence, and neglect, and the sudden and unexpected decease of his said wife, no writings were prepared or executed conveying or disposing of, or in any way or manner affecting, the said premises, or any part thereof. Whether, if a parol agreement by the wife to convey were alleged, the allegations that the plaintiff entered into possession and made valuable improvements, etc., would, in view of the other facts alleged and of the presumptions of law therefrom, show that the entry and possession of the plaintiff, and the improvements made, were under and in pursuance of the alleged contract of the wife, so as to authorize a specific performance of the contract, *query*, *Ib.*, per McMillan, J.

² Dunham v. City of Boston, 12 Allen, 375.

³ *Ib.*, per Chapman, J.

defendant derives benefit from it, and unless it is enforced the plaintiff will be without redress. A., who had the lease of a house for a term of eighty years, and having forty-nine years to run, contracted with B. to let the premises to him for a specified rent. The time the under-lease was to continue was not designated, but the contract recited that A. agreed to let B. have a lease at the same rent "at any period he may feel disposed"; and further, "not to molest, disturb, or raise the rent of B. after his having laid out money in improving the said premises." B. at the time had no knowledge of the nature of A.'s interest in the premises. B. having taken possession and expended a considerable sum of money in improvements, and the lease having over twenty years to run, the personal representatives of A. advertised the property for sale without making mention of any interest or claim of B. Thereupon the latter brought a suit for specific performance and an injunction, to which it was objected that the agreement was too vague to be enforced. It was, however, held that B. was entitled to an under-lease for the residue of the term.¹ So when the incompleteness of the contract has arisen through the default of the defendant, and the objection can be remedied, the court will not refuse to interfere.² So, a suit may be maintained on a contract where, although some term as to price or subject matter be not ascertained, yet the court has the means of ascertaining it. Thus, in a contract for the sale of land under an act of Parliament in which the sum was not ascertained, the court directed the defendants to issue their warrant to the sheriff to summon a jury to fix the compensation.³ And where a memorandum of agreement for the sale of real estate, referred, for a description of the property sold, to the deeds in the possession of a person named, it was held sufficient, as the property might be ascertained before the

¹ Kusel v. Watson, L. R. 11, Ch. D. 129.

² Pritchard v. Ovey, 1 J. & W., 396; Lord Kensington v. Phillips, 3 Dow., 61.

³ Walker v. Eastern Counties R.R. Co., 6 Hare, 594.

master.¹ So, a contract to sell land within certain boundaries, described as partly leasehold and partly freehold, was held a valid agreement to convey the vendor's interest in the property, as the boundary of the different tenures might be ascertained.²

§ 143. *Objection as to time.*—The contract may be incomplete in respect to time. Where a person made an offer in writing to convey land, fixing the time when, and the price at which, it should be conveyed, naming a certain sum to be paid upon the execution of the deed, and the balance in a mortgage on the land at six per cent. interest, it was held that as the time when the amount secured by the mortgage was to be paid was not designated, a material part of the contract had been left open for further negotiation, and hence specific performance would not have been decreed, even if the offer had been accepted.³ So, a contract for the sale of land in which the parties agreed to appoint two persons to fix the cash value of a house and lot that the vendor was to take of the vendee in part payment, but which did not specify within what time it should be done, was held too incomplete to be enforced in equity.⁴ And an agreement for the sale of land which provided that the grantee should make payment by assuming a debt of the grantor, and pay the balance on such terms as might "be agreed on by said parties," was held incapable of enforcement. "So far as the defendant had bound himself, it was upon an express stipulation that the terms of payment should be only such as he might thereafter consent to in a further agreement. Time being included in the terms thus became of the essence of the contract."⁵ It is sufficient for the purposes of defence, that the contract was essentially incom-

¹ Owen v. Thomas, 3 M. & K., 353. And see Haywood v. Cope, 4 Jur. N. S., 227.

² Monro v. Taylor, 8 Hare, 51.

³ Potts v. Whitehead, 20 N. J. Eq., 55. And see Williams v. Stewart, 25 Minn., 516. See, however, Friebert v. Burgess, 11 Md., 452.

⁴ Baker v. Glass, 6 Munf., 212.

⁵ Huff v. Shepard, 58 Mo., 242. See Wiley v. Robert, 31 Ib., 212.

plete when the suit was brought, as that would show that the plaintiff, at the filing of the bill, had no cause of action. Accordingly, where the consent of a tenant for life was necessary to the contract, it was held not enough that the consent was given after the commencement of the suit and before the hearing.¹ So, the adoption of a contract by a third person cannot relate back so as to render a party liable to a suit for its non-performance, when its non-performance was at the time justifiable.²

§ 144. *Definiteness required as to thing stipulated.*—The subject matter of a contract being the most important term, it must be defined with such clearness, as that the party may know with certainty what he is contracting for, and that it may be ascertained by the court.³ It need not, however, be so described as to leave no doubt as to what thing is meant; extrinsic evidence being admissible to explain ambiguous terms capable of explanation in order to show what the parties intended by the language employed, and the relation they sustained toward each other at the time of the execution of the contract.⁴ If the contract refers to another writing, parol evidence is admissible to identify the writing;⁵ but the subject matter must be described with such precision, as to be at least capable of identification by the aid of such extrinsic evidence as may be admissible for

¹ Adams v. Brooke, 1 Y. & C. C. C., 627.

² Right v. Cuthell, 5 East., 491; Doe D. Mann v. Walters, 10 B. & C., 626; Doe D. Lyster v. Goldwin, 2 Q. B., 143.

³ Stewart v. Alliston, 1 Mer., 26, 33; Kennedy v. Lee, 3 Ib., 441; Daniels v. Davison, 16 Ves., 256; King v. Ruckman, 20 N. J. Eq., 316; Carr v. Passaic Land, etc., Co., 22 Ib., 85; Ross v. Baker, 72 Pa. St., 186; Miller v. Campbell, 52 Ind., 125; Holmes v. Evans, 48 Miss., 217; Bell v. Warren, 39 Texas, 106; Lynes v. Hayden, 119 Mass., 482; *post*, § 152.

⁴ See Murly v. M'Dermott, 8 A. & E., 138; Clayton v. Lord Nugent, 13 M. & W., 207; Sarl v. Bourdillon, 1 C. B. N. S., 188; Waring v. Ayres, 40 N. Y., 357; Robeson v. Hornbaker, 2 Green Ch., 60; Fowler v. Redican, 52 Ill., 405; Mead v. Parker, 115 Mass., 413. Thus, extrinsic evidence was admitted to show what property was intended by the words "Mr. Ogilvie's house," Ogilvie v. Foljambe, 3 Mer., 53; "The house in Newport," Owen v. Thomas, 3 M. & K., 353; and "The property in Cable Street," Bleakly v. Smith, 11 Sim., 150.

⁵ Clinan v. Cooke, 1 Sch. & Lef., 21, 33.

that purpose.¹ Where a bond for the sale of real estate was objectionable in every respect, except the description, and that was not complete, but consistent so far as it went, it was held that it might be completed by extrinsic parol evidence, provided a new description was not introduced into the contract, and provided the pleadings in the case contained the necessary averments.² When it is necessary to identify the thing in respect to which specific performance is sought, its connection with the subject matter of the contract must be alleged in the bill and be supported by proof.³

§ 145. *Indefiniteness as to persons.*—To render a contract a binding agreement, it must, of course, contain the names of the contracting parties.⁴ The term “vendor” is not of itself a sufficient description of one of the parties.

¹ Price v. Griffith, 1 De G. M. & G., 80; King v. Wood, 7 Miss., 389. “The general rule I take to be, that, where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties, is utterly inadmissible. The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubts arise upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party.” Lord Tindal, C. J., in Shore v. Wilson, 9 C. & F., 355. “There is no material difference of principle in the rule of interpretation between wills and contracts, except what naturally arises from the different circumstances of the parties. The object in both cases is the same, namely, to discover the intention; and to do this, the court may, in either case, put themselves in the place of the party, and then see how the terms of the instrument affect the property or subject matter.” 1 Greenl. Ev., Sec. 287.

² Torr v. Torr, 20 Ind., 118.

³ Price v. Griffith, 1 De G. M. & G., 80. If the description be substantially correct, and is erroneous in a slight degree only, the purchaser will be compelled to perform the contract, if the sale is fair and there is a good title. If the purchaser gets substantially what he bargained for, he will in general be held to the purchase, with compensation for small deficiencies. King v. Bardeau, 6 Johns. Ch., 38. See *post*, § 502.

⁴ Champion v. Plummer, 1 N. R., 253; Warner v. Willington, 3 Drew, 523; Squire v. Whitton, 1 House of Lds., 333; *post*, § 155; see Smith v. Wheatcroft, L. R. 9, Ch. D. 223.

On a sale of real estate at auction, the particulars and conditions of sale did not disclose the vendor's name, but stated that B. was the auctioneer. The purchaser of one of the lots signed a memorandum acknowledging his purchase, and B. signed at the foot of the memorandum the following, "Confirmed on behalf of the vendor." It was held that, as the memorandum did not sufficiently show who the vendor was, a suit for the specific performance of the contract of sale must be dismissed.¹

§ 146. *Uncertainty as to consideration.*—In every contract of sale the price is essential; and if it is neither expressed nor capable of ascertainment, the contract cannot be enforced by reason of its incompleteness;² as, where a person agrees to sell land to another for a certain sum less than any one else will give, it being impossible to tell what that would be.³ Where the only memorandum of an agreement for the sale of land was a receipt for part of the purchase money, in which the lot was defined, but the price and other terms of the sale not stated, it was held insufficient to entitle the vendee to a specific performance.⁴ So, specific performance was refused where it was agreed that the price should be fixed by arbitrators, but their award did not do it with clearness.⁵ And where an award was based on an erroneous view of the facts, and was such as the court could not act on by reason of the improper conduct of one of the arbitrators, it was held that the suit could not be maintained.⁶

§ 147. *Importance of manner of fixing price.*—Although

¹ Potter v. Duffield, L. R. 18, Eq. 4. But it has been held that property may be put up for sale at auction in behalf of "the proprietor," and that it is sufficient if the owner's name is disclosed when the bill is filed for specific performance. Beer v. London & Paris Hotel Co., L. R. 20, Eq. 412; and see Rossiter v. Miller, L. R. 5, Ch. D. 648; Sale v. Lambert, L. R. 18, Eq. 1.

² Elmore v. Kingscote, 5 B. & C., 583; Goodman v. Griffiths, 26 L. J. Exch., 145; Spangler v. Danforth, 65 Ill., 152; Huff v. Shepard, 58 Mo., 242; Mastin v. Halley, 61 Ib., 196; Grace v. Denison, 114 Mass., 116.

³ Bromley v. Jefferies, 2 Vern., 415.

⁴ Soles v. Hickman, 20 Pa. St., 180.

⁵ Hopcraft v. Hickman, 2 Sim. & Stu., 130.

⁶ Chichester v. McIntyre, 4 Bli. N. S., 79.

it is competent for the parties to the contract to agree on a mode of thereafter fixing the price, yet, until the price is determined, the contract will not be enforced.¹ Accordingly, where the parties to an agreement for the sale of land left the price to be afterward ascertained and fixed by them, and one of them died before the price had been fixed, it was held that the agreement was too incomplete to sustain a bill for specific performance.² The method of ascertaining the price may be material: as that it be determined by arbitrators; in which case, if this be not done, the contract continues incomplete, and consequently incapable of enforcement.³ Were it not so, a substantial part of the agreement would be changed by the court, and, in fact, a different one made from that entered into by the parties, which would be wholly inadmissible.⁴ In accord-

¹ *Darby v. Whitaker*, 4 Drew, 134.

² *Graham v. Call*, 5 Munf., 396.

³ *Norfleet v. Southall*, 3 Murphy, 189. "A man who agreed to sell at a price to be named by A., B., and C., could not be compelled by a court of equity to sell at any other price." Sir J. Leach in *Morse v. Merest*, 6 Mad., 26.

⁴ A court of equity cannot change a contract and then enforce it. *Valetti v. White Water Canal Co.*, 4 McLean, 192; *Cassady v. Woodbury*, 13 Iowa, 113; *Haskell v. Allen*, 23 Me., 448; *Grey v. Tubbs*, 43 Cal., 359; *Phila., etc., R.R. Co. v. Lehigh, etc., Co.*, 36 Pa. St., 204. The following are a few of the numerous examples of this very obvious principle: A. agreed to convey to B. a large tract of land on payment of the purchase money. B. went into possession of the land, and continued in possession twelve years, and paid a small portion of the purchase money. The court refused to decree a conveyance of a proportionate quantity of the tract of land, which would be injured by such division. *Prater v. Miller*, 3 Hawks N. C., 628. Where the heirs of a vendee who had a contract for land, and had paid the whole price, sold and conveyed a portion of the land, it was held that their grantee could not maintain a bill against the heirs of the vendor to compel them to execute a conveyance of the part sold, for the reason that such a bill asked the court to make a new contract for the parties. *Lord v. Underdunck*, 1 Sandf. Ch., 46. In *—— v. Walford*, 4 Russ., 372, A. had contracted with B. to convey to him an estate, and before the conveyance B. resold it to C., and A. signed a writing with B. agreeing to convey to C., at B.'s request. C. then agreed to convey the estate to W., who gave notice of that agreement to A., and required him to convey the estate to W. In consequence of this, A., when requested by B. to convey the estate to C., refused. B. then filed a bill against A. to compel him to convey to C. It was held that W. was not a necessary party; that A. should have conveyed to C., and that A. must pay the costs of the suit. A. contracted to remove a bank of earth and gravel from B.'s land, agreeing not to pass over B.'s land, and to pay one dollar for each square removed. Before the work was completed, C., over whose land it was necessary to pass, revoked his license to A., and B. offered to permit the agents of A. to carry the gravel over his land; but this would be very expensive. As an acceptance of B.'s offer would constitute a new contract, and if B. had sustained any damage by the non-completion of the

ance with this principle, where it was agreed that property should be sold at a price to be fixed by valuers, one to be appointed on each side, or by their umpire, and the valuers were unable to agree, it was held that the court could not supply the defect by appointing other valuers.¹ And where a husband entered into an agreement to set aside a certain amount of his property for the maintenance of his wife, to be selected by her, and valued by two designated persons,

contract, he had a remedy at law, specific performance was refused. *Sears v. City of Boston*, 16 Pick., 357. Where a husband and wife brought a suit for the specific performance of a parol contract to convey land to the wife, and the evidence showed that the agreement was to convey to the husband, it was held that the bill must be dismissed, though the proof showed that the husband afterward directed the conveyance to be made to his wife, the other party assenting. *Wilson v. Wilson*, 6 Mich., 9. The plaintiff agreed to sell certain real estate to a railroad company for a sum to be paid on completion, with interest at four per cent. from the date of the agreement. The company was to be entitled to possession on making a given deposit. If, without fault of the vendor, the purchase was not completed in six months, the interest from that time was to be at the rate of five per cent. The company paid the deposit, and took possession. More than four years having elapsed without completion by the company, which upon being applied to alleged its inability, the plaintiff filed a bill for specific performance, and asked that he might be declared entitled, at his option, either to enforce the agreement, or to rescind it, and that in the latter case the deposit might be declared forfeited to the plaintiff, and that the company might be ordered to deliver up possession of the land to him, and might be restrained by injunction from remaining in possession or using the land for the purposes of a railway. Held that the vendor could not claim any right beyond what was given by the agreement, and as that provided for the payment of an increased rate of interest in case of delay, he was not entitled to an order on motion for the payment of the balance of the purchase money into court, but must go on to decree. *Pryse v. Cambrian R. R. Co.*, L. R. 2, Ch. 444. The defendant advanced money under a verbal agreement that an existing mortgage should be considered security for such advance. A court of equity refused to hold the land as security for the debt, or compel the execution of a proper mortgage; a loan of money with the mere understanding that the land of the borrower is security for the debt not creating a mortgage, legal or equitable. *Stoddart v. Hart*, 23 N. Y., 556. "If A. should loan money to B., and take a bond, with the understanding that the farm of the latter should be considered a security, but with no intention or agreement to make a mortgage or writing of any sort, as the law requires in order to create a lien, none would be created in law or in equity. The transaction, in judgment of law, would amount simply to a loan upon the bond of the borrower. Such, I think, was the transaction in question." *Ibid.*, per Comstock, Ch. J. Equity will not ordinarily enforce a contract into which new terms are to be introduced by parol evidence; as courts of equity deem the writing to be higher proof of the real intention of the parties than parol proof can generally be, independently of the objection which arises under the statute of frauds. *Whitaker v. Van Schoiack*, 5 Oregon, 113; *Heth v. Woodridge*, 6 Rand, 605; *Hancock v. Edwards*, 7 Humph., 349.

¹ *Milnes v. Gery*, 14 Ves., 400. And see *Blundell v. Brettargh*, 17 Ib., 232; *Agar v. Macklew*, 2 S. & S., 418; *Frith v. Midland R.R. Co.*, L. R. 20, Eq. 100; *Norfleet v. Southall*, 3 Murphy, 189; *Graham v. Call*, 5 Munf., 396; *Baker v. Glass*, 6 Ib., 212.

it was held that a court of equity had no power to select other appraisers and enforce performance of the agreement without the consent of the husband.¹ So, where it was stipulated that the price should be determined in one of two specified ways, and no election as to the mode of ascertainment was made, it was held that there was no contract.² The difficulty will not be obviated, notwithstanding the price has not been fixed in consequence of the defendant's default. Thus, where the contract was to sell at a price to be determined by arbitrators, and the defendant having refused to execute an arbitration bond, it was doubtful whether any award would be made, the court declined to interfere;³ and it did the same where the refusal of one of the valuers to proceed was said to have been caused by his being told by the defendant that he did not intend to complete.⁴

§ 148. *When price ascertained by court.*—When the mode agreed upon for fixing the price is not of the essence of the contract, but the agreement is substantially for a sale at a fair price, upon a failure to determine the amount, the court looking to the substance rather than to the form of the contract, will adopt some other means of arriving at the price, and of thus carrying out the agreement in its essential features.⁵ It was said in one case, that where possession and expenditure were referable to an agreement to give a fair consideration, the court would “endeavor, by

¹ Willingsford v. Willingsford, 6 Har. & Johns., 485.

² Morgan v. Milman, 3 De G. M. & G., 24.

³ Wilks v. Davis, 3 Mer., 507.

⁴ Darbey v. Whitaker, 4 Drew, 134.

⁵ Smith v. Peters, L. R. 20, Eq. 511; Whitlock v. Duffield, 1 Hoffm. Ch., 110; Vandoren v. Robinson, 16 N. J. Eq., 110. “Lord Eldon, in Cooth v. Jackson, 6 Ves., 34, seems to have doubted whether the court would ever take upon itself, in this respect, to separate the essential from the non-essential terms of the contract. He considered that when a reference had been made to arbitration, and the judgment of the arbitrators was not given in time and manner according to the agreement, the court had no jurisdiction to substitute itself for the arbitrators, and make the award, even where the substantial thing to be done was agreed upon between the parties, and the time and manner in which it was to be done was that which they had put upon others to execute.” Fry on Specif. Perform., 96; and see Blundell v. Brettargh, 17 Ves., 232.

every means within the legitimate bounds of its jurisdiction, to ascertain the amount of the consideration.”¹ In a suit on a contract for the sale of land and bleach works at a sum specified, the plant and machinery to be taken at a price to be fixed by valuers, it was held that as the latter was a subsidiary stipulation, the price might be ascertained in another way, which, having been done, specific performance was decreed.² So, where a contract to grant a lease provided that the lease should contain such contingencies as a certain person should deem reasonable and proper, the settlement of the lease was referred to a master, the agency of the person named not being regarded as of the essence of the contract, and the court holding that it would not grant relief through the medium of a reference compulsory on the other party.³ An obstacle to the ascertainment of the price in the mode agreed, may be interposed by the unexpected disabling of one of the parties; and where this is the case, equity will not withhold relief. Where the vendor having become insane, the valuers could not be nominated, it was held not to be an insurmountable obstacle to relief; the court remarking that “if there was a valid and binding contract, the supervening incapacity of one party cannot deprive the other of the benefit.”⁴

§ 149. *Material omissions from contract.*—It is impossible to enumerate all of the terms which ought to be embraced in every contract. Whether or not an alleged

¹ *Meynell v. Surtees*, 3 Sm. & Gif., 101, 113, per Vice-Chancellor Sir. J. Stuart; *affd.* 1 Jur. N. S., 737.

² *Jackson v. Jackson*, 1 Sm. & Gif., 184; and see *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Ib., 119, 123.

³ *Gourlay v. Duke of Somerset*, 19 Ves., 429. Contracts will not be specifically enforced, the essential terms of which are subject to the approval of third persons. “There is no instance of a plaintiff seeking the interposition of the court and obtaining it, who has been held entitled to have any part of his relief administered to him through the medium of a reference compulsory on the other party. A bill seeking that, would be *pro tanto*, a bill to enforce the specific performance of an agreement to refer to arbitration; a species of bill that has never been entertained.” *Ibid.* approved in *South Wales R.R. v. Wythes*, 5 De G. M. & G., 880.

⁴ *Hall v. Warren*, 9 Ves., 605.

agreement contains every material term, and every detail requisite to constitute a complete contract, will of course depend upon the circumstances of each case. Although the terms of the agreement are general, yet it will be enforced if the law supplies the details; but not if details are omitted which the court cannot adopt.¹ The following omissions were held to render the contract incomplete: The date at which a lease was to commence;² the time when an increased rent was to begin;³ the length of the term to be granted;⁴ an agreement for a lease of mines which did not define the mineral area;⁵ a contract for a lease for lives, which neither named the lives, nor provided for their being named;⁶ silence in a contract for a partnership as to the amount of capital, and the manner in which it was to be furnished;⁷ leaving unsettled a term as to the expenses;⁸ where an auctioneer's receipt, set up as a contract, did not refer to the conditions of sale, or show the proportion which the deposit was to bear to the price.⁹

§ 150. *Presumption as to omitted terms.*—The silence of an agreement as to terms which may be implied by legal presumption does not render it incomplete.¹⁰ If a person accepts a contract by which he is to be benefited when he shall have done a certain thing on or before a certain day,

¹ South Wales R.R. Co. v. Wythes, 5 De G. M. & G., 888; Ridgway v. Wharton, 6 House of Lds., 285. See Nichols v. Williams, 22 N. J. Eq., 63; Tiernan v. Gibney, 24 Wis., 190; Clark v. Clark, 49 Cal., 586; Riley v. Farnsworth, 116 Mass., 223; Pickett v. Merchants' National Bank, 32 Ark., 346.

² Blore v. Sutton, 3 Mer., 237. And see Cox v. Middleton, 2 Drew, 209; Hersey v. Giblett, 18 Beav., 174.

³ Lord Ormond v. Anderson, 2 Ba. & Be., 363.

⁴ Clinan v. Cooke, 1 Sch. & Lef., 22; Gordon v. Trevelyan, 1 Price, 64; Meyers v. Forbes, 24 Md., 595.

⁵ Lancaster v. De Trafford, 31 L. J. C., 554.

⁶ Wheeler v. D'Este, 2 Dow., 359.

⁷ Downs v. Collins, 6 Hare, 418.

⁸ Stratford v. Bosworth, 2 V. & B., 341.

⁹ Blagden v. Bradbear, 12 Ves., 466.

¹⁰ It has been held that "as a general rule, between vendor and purchaser, the latter must admit as presumptions, all matters which, in a court of law, the judge would clearly direct the jury to presume; but not matters as to which the judge would leave it to the jury to pronounce upon the effect of the evidence." Dart's V. & P., 162; Emery v. Grocock, 6 Mad., 54; Hillary v. Waller, 12 Ves., 239.

such acceptance amounts to an agreement on his part to perform the act by the time named.¹ An agreement to sell land, is, in the absence of anything expressed to the contrary, an agreement to sell the whole of the vendor's interest therein;² and such interest, if not specified, will be presumed to be an estate in fee simple.³ In the absence of any restrictive expressions, the interest contracted to be sold will be accompanied by all the advantages which are legally incidental to it.⁴ In a contract for an underlease it is implied that the lessee is to be subject to the covenants in the superior lease.⁵ When, however, a head lease contains unusual covenants of which the sub-lessee had no notice, and he has not taken possession of the property, it is doubtful whether the court would decree specific per-

¹ *Roberts v. Marston*, 20 Me., 275.

² *Bower v. Cooper*, 2 Hare, 408.

³ *Sug. V. & P.*, 339; *Hughes v. Parker*, 8 M. & W., 244; *Cattel v. Corral*, 4 Y. & C. Ex., 228, 236. Where the agreement does not call for a deed with full covenants, the vendee is only entitled to a good and sufficient deed to convey the title in fee simple. *Lounsbury v. Locander*, 25 N. J. Eq., 554; *Thayer v. Torrey*, 37 N. J. Law, 339.

⁴ *Pope v. Garland*, 4 Y. & C. Ex., 403. In New York, it is provided by statute that "every grant or devise of real estate, or any interest therein, hereafter to be executed, shall pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of such grant." N. Y. Rev. Sts., 6th Ed., Vol. 2, p. 1130. "No covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not." *Ib.*, p. 30. In several of the States it is provided by statute, that the words grant, bargain, and sale in a conveyance in fee, shall, unless specially restrained, amount to a covenant that the grantor was seized of an estate in fee freed from incumbrances, and for quiet enjoyment as against his acts. In *Frost v. Raymond*, 2 Caines, N. Y., 188, it was held that the words "grant, bargain, sell, alien, and confirm," did not imply a covenant of title in a conveyance in fee; that the word "grant," or the word "demise," implied a covenant of title in a lease for years; and that the word "give" amounted to an implied warranty during the life of the feoffor. But this decision, though sound at common law, is no longer authority in New York, under the provision in the revised statutes.

The conveyance of a dwelling-house will pass other erections so connected with it as to constitute one building. *Hilton v. Gilman*, 17 Me., 263; and where land is conveyed with the appurtenances, all buildings pass which are attached to, or connected with, the house, and the close in which the house stands. A grant of woods passes the land so far as it is necessary for the support of the trees. *Clap v. Draper*, 5 Mass., 268. The term "tenement" signifies whatever of a permanent nature is capable of being holden, whether corporeal or incorporeal. The conveyance of the whole carries all its parts, as well at law as in equity, though some of them were not contemplated by the parties. And a deed of all a person's share and interest passes reversionary, as well as the present estate. *Sowle v. Sowle*, 10 Pick., 376.

⁵ *Cosser v. Collinge*, 3 My. & K., 283; *Smith v. Capron*, 7 Hare, 185.

formance ;¹ but otherwise, if the sub-lessee took possession with constructive notice of the covenants.² In every contract for the sale of real estate, there is an implied undertaking to furnish a good title, unless such an obligation is expressly excluded by the terms of the agreement.³ The title to be shown will depend upon the property conveyed.⁴ The sale of a lease includes the title of the lessor ;⁵ and an agreement to renew is presumed to be for the same term as the preceding lease.⁶ Where there is a sale of real estate, and the conditions of the sale have been fully performed on the part of the purchaser, it will be presumed that the vendor undertook to make such conveyance as will render the sale effectual.⁷

§ 151. *Condition rebutted or waived.*—There can only be a term by legal presumption in the absence of an express provision in relation to the same matter.⁸ The language of the contract may therefore negative the existence of a condition which would otherwise be implied ; as where it limits the title to be made, or provides that the purchaser shall merely take the vendor's interest.⁹ So, an implied term

¹ See *Flight v. Barton*, 3 My. & K., 282.

² *Cosser v. Collinge*, *supra*. Whether there is a presumption that an executory contract shall contain all the stipulations usually inserted in such contracts, *query*. *Ricketts v. Bell*, 1 De G. & Sm., 335.

³ *Doe D. Gray v. Stanion*, 1 M. & W., 695, 701 ; *Worthington v. Warrington*, 5 C. B., 635 ; *Holland v. Holmes*, 14 Fla., 390. It devolves on the vendee, if he questions the title, to show the defect. *Brown v. Bellows*, 4 Pick., 179 ; *Breithaupt v. Thurmond*, 3 Rich., 216 ; *Dwight v. Cutler*, 3 Mich., 566.

⁴ *Curling v. Flight*, 6 Hare, 41 ; S. C. 2 Phil., 613. An agreement or covenant to convey a good title, does not necessarily entitle the covenantee to a warranty deed ; the right of property and of exclusive possession, which constitutes a good title, being effectually vested in him by a deed of quit claim. *Gazley v. Price*, 16 Johns., 267 ; *Potter v. Tuttle*, 22 Conn., 512 ; *Kyle v. Kavanaugh*, 103 Mass., 356. *Contra*, *Hoback v. Kilgore*, 26 Gratt., 442. Where real estate is sold and title bond given, the vendee is liable for tax assessments on the land subsequent to the sale. *Hall v. Denckla*, 28 Ark., 506.

⁵ *Fildes v. Hooker*, 2 Mer., 424 ; *Souter v. Drake*, 5 B. & Ad., 992 ; *Hall v. Betty*, 4 Man. & Gr., 410. See *Boyd v. Schlessinger*, 59 N. Y., 301. As to an agreement for the sale of a contract for a lease, see *Kintrea v. Preston*, 25 L. J. Exch., 287.

⁶ *Price v. Assheton*, 1 Y. & C. Ex., 82.

⁷ *Hoffman v. Fett*, 39 Cal., 109.

⁸ *Galloway v. Holmes*, 1 Doug. Mich., 330.

⁹ *Freme v. Wright*, 4 Mad., 364.

may be rebutted by notice.¹ Where, for instance, a purchaser, at the time, or previous to entering into the contract, has notice that his vendor is only a lessee, he cannot insist that he contracted in fee.² So, although the contract be silent in respect to time, either party may, by proper notice, bind the other to complete within a reasonable specified period.³ And time, although originally of the essence of the contract, or afterward made imperative in equity by notice may be enlarged or waived by subsequent agreement, or by the acts of the parties. Thus, if the purchaser go on with the purchase after the time fixed by the contract or by his notice has expired, it is a waiver.⁴ So, where a purchaser did not demand possession until a late hour at night on the day fixed for completion, and the property consisted of cottages let to weekly tenants, it was held at law to amount to a waiver of the condition as to time.⁵

§ 152. *Importance of certainty as to what was agreed.*—A contract, to be capable of specific enforcement, must be so certain as not likely to be misunderstood by either party, and its terms be established by satisfactory proof. The certainty required for the specific performance of a contract for the sale of land, has reference both to the description of

¹ Ogilvie v. Foljambe, 3 Mer., 53, 64.

² Cowley v. Watts, 17 Jur., 172.

³ Stewart v. Smith, 6 Hare, 222, *note*. Time may be implied from the nature or condition of the subject matter. McKay v. Carrington, 1 McLean, 59; Hoyt v. Tuxbury, 70 Ill., 391. Where it appears that the parties have contracted that time shall be essential in a contract of purchase, a court of equity will not disregard the contract in order to give effect to some vague surmise that all the vendor intended to secure by the contract was the payment of the purchase money, with interest, at some indefinite time. Grey v. Tubbs, 43 Cal., 359. Specific performance of a contract to give a mortgage may be enforced, although no time is limited for the payment of the mortgage. Friebert v. Burgess, 11 Md., 452; Farrell v. Bean, 10 Ib., 233.

⁴ King v. Wilson, 6 Beav., 124. See Gardner *ex parte*, 4 Y. & C. Ex., 503; *post*, § 482.

⁵ Palmer v. Temple, 1 P. & D., 379. The question of waiver is one of fact. 1 Sug. V. & P., 8th Ed., 517; Burroughs v. Oakley, 3 Swanst., 159; Paige v. Greeley, 75 Ill., 401. A contract has been said to consist of three classes of elements: 1st, those things which are essential, without which the contract cannot exist; 2d, those which are of the nature, but not of the essence, of the contract, being implied in it unless expressly excluded, but capable of being thus excluded without subverting the contract; and 3d, the things that are accidental.

the property and the estate to be conveyed.' Although a contract may contain a full recital of everything to which the parties agreed, yet it may be so ambiguous as to one or more of its material terms, as to fail to express the intention of the parties with requisite precision. If there be strong doubt whether both parties to a contract understood it alike, the court will not decree specific performance.² It

¹ O'Brien v. Pentz, 48 Md., 562; Shriver v. Seiss, 49 Ib., 384; Shakspeare v. Markham, 10 Hun., 311; Cox v. Cox, 59 Ala., 591; *ante*, § 144. The court gives specific performance instead of damages only when it can by that means do more perfect and complete justice. An agreement which is not so definite in its terms or in its nature as to make it certain that better justice will be done by attempting to enforce it than by leaving the parties to their remedy in damages, is not one which the court will specifically perform. Wilson v. Northampton & Banbury Junction R.R. Co., L. R. 9, Ch. 279. With reference to contracts which can be enforced, it is well settled that "every agreement of this kind ought to be certain, fair, and just in all its parts. If any of these ingredients are wanting in the case, equity will not decree specific performance." Buxton v. Lister, 3 Atk., 386, per Lord Hardwicke. In an early case, Lord Rosslyn said: "I lay it down as a general proposition, to which I know no limitation, that all agreements, in order to be executed in this court, must be certain and defined; 2dly, they must be equal, and fair; for this court, unless they are fair, will not execute them; and 3dly, they must be proved in such manner as the law requires." Lord Walpole v. Lord Orford, 3 Ves., 420. And see Underwood v. Hitchcox, 1 Ves. Sen., 279; Franks v. Martin, 1 Ed., 309; Stoddert v. Tuck, 5 Md., 37; Smith v. Crandall, 20 Ib., 500; Worthington v. Semmes, 38 Ib., 298; Reese v. Reese, 41 Ib., 554. Clearness and certainty in a contract are obviously so important and fundamental, it seems scarcely necessary to say very much on the subject, or to refer to many authorities. The following cases will give the student some idea of the manner in which precision in agreements is regarded by the courts: Colson v. Thompson, 2 Wheat., 336; Carr v. Duval, 14 Pet., 77; Kendall v. Almy, 2 Sumn., 278; Bowen v. Waters, 2 Paine, 1; Morrison v. Rossignol, 5 Cal., 64; Minturn v. Baylis, 33 Cal., 129; Miller v. Cotten, 5 Ga., 341; Fitzpatrick v. Beatty, 6 Ill. (Gilm.), 454; Burke v. Creditors, 9 La. An., 57; McMurtrie v. Bennette, Harr. Ch., Mich., 124; Montgomery v. Norris, 2 Miss. How., 499; Rockwell v. Lawrence, 6 N. J. Eq., 2 Halst., 190; Lockerson v. Stillwell, 13 N. J. Eq., 2 Beas., 357; Waters v. Brown, 7 J. J. Marsh, 123; Goodwin v. Lyon, 4 Porter, Ala., 297; Madeira v. Hopkins, 12 B. Mon., 593; Graham v. Call, 5 Munf., 396; Aday v. Echols, 18 Ala., 353; Sheid v. Stamps, 2 Sneed, Tenn., 172; Agard v. Valencia, 39 Cal., 292; Talman v. Franklin, 3 Duer, 395; Lobdell v. Lobdell, 36 N. Y., 327; Wiswell v. Teft, 5 Kans., 263; Long v. Duncan, 10 Ib., 294; Johnson v. Johnson, 16 Minn., 512; Hardesty v. Richardson, 44 Md., 617; Hyde v. Cooper, 13 Rich. Eq., 250; McKibbin v. Brown, 14 N. J. Eq., 13; Welsh v. Bayud, 21 Ib., 186; Huff v. Shepard, 58 Mo., 242; Roundtree v. McLean, Hempst., 245; Lloyd v. Wheatley, 2 Jones, 267; Duvall v. Myers, 2 Md. Ch., 401; Wadsworth v. Manning, 4 Md., 59; Clarke v. Rochester, etc., R.R. Co., 18 Barb., 350; Wright v. Wright, 31 Mich., 380; Odell v. Morin, 5 Oregon, 96; Mehl v. Von der Wulbeke, 2 Lans., 267; Foot v. Webb, 59 Barb., 38; Munsell v. Loree, 21 Mich., 491; McClintock v. Laing, 22 Ib., 212; Allen v. Webb, 64 Ill., 342; Buckmaster v. Thompson, 36 N. Y., 558; Bowman v. Cunningham, 78 Ill., 48; Schmeling v. Kriesel, 45 Wis., 325. An objection, however, to a contract on the ground that it is lacking in certainty, will be entertained with reluctance when the contract has been partly performed, and the plaintiff can only be fully compensated by performance in specie.

² Coles v. Bowne, 10 Paige Ch., 526.

has even been held that where one of them proves that he understood the agreement in a different sense from the other, the court will decline to interfere, without considering whether or not the defendant's construction is reasonable.¹ Considerations as to the certainty of a contract sought to be enforced, arise in a suit for specific performance, which do not present themselves in an action at law for damages occasioned by a breach. This necessarily follows from the different nature of the two proceedings; the court being asked, in the one case, to uphold and carry out an alleged agreement, the very existence of which in everything essential to show the exact intention of the parties is to be established by proof; while, in the other case, the proposition to be sustained by the plaintiff is the negative one that the defendant has not fulfilled, it may be any part of the contract. No very comprehensive or definite rule can be laid down as to the precision required in a contract sought to be enforced in a court of equity. It can only be said that the certainty must be a reasonable one with regard to the subject matter of the agreement, its object, the situation of the parties, and the circumstances under which, and with reference to which, the agreement was made, so that on a fair construction of its terms there can be no good reason to doubt what was intended.²

§ 153. *Immaterial omissions.*—The following cases will serve to show what kind of contracts have been specifically

¹ Wycombe R.R. Co. v. Donnington Hospital, L. R. 1, Ch. 268. Where the court is unable, from all the circumstances of a case, to say whether the minds of the parties met upon all the essential particulars, or if they did, then cannot say exactly upon what substantial terms they agreed, or trace out any practical line where their minds met, specific performance will be refused. *Blanchard v. Detroit, etc., R.R. Co.*, 31 Mich., 44.

² *Marsh v. Milligan*, 3 Jur. N. S., 979; *Taylor v. Williams*, 45 Mo., 80. The principle of equity that where doubt exists, the court will not decree specific performance, refers to the terms of the contract, and not to a particular fact in the case. *Walton v. Coulson*, 1 McLean, 120. Where the terms are uncertain, and a long time has elapsed since the agreement was made, and after the circumstances under which it was entered into have materially changed, a court of equity will not interpose. *Pigg v. Corder*, 12 Leigh, 69. If, however, the meaning of a contract, taken as a whole, is intelligible to the court, specific performance will be decreed. *Bull v. Bull*, 4 Wis., 54.

enforced, though they were not wholly free from ambiguity. A memorandum of purchase in these words, "My purchase of your one-half E. B. wharf and premises as agreed on between us," was held sufficiently definite. The court remarked that "E. B. wharf" might be as certain a description of locality as F. Street; and then the ambiguity could only arise if it were shown that the bargainor had more than one house in F. Street, like the two manors of Dale, put by several authors.¹ So, a memorandum of a contract for the sale of land which described the property as building lots on One hundred and thirty-second and One hundred and thirty-third Streets, between the Fifth and Sixth Avenues, giving the numbers of the lots, and stating that they were Harlem lots, resold because former purchasers failed to comply with the terms of sale, was held sufficiently certain.² The following description of real estate sold was held sufficient: "Received, Newark, N. J., December 9th, 1874, of L., the sum of five hundred dollars in full for title to property held by R. on Prince Street and Thirteenth Avenue, in city of Newark, N. J.; which said title is held by said R. by declaration of sale from Mayor and Common Council of Newark, and which shall be assigned to said L. within two days from the date hereof. H., attorney for R."³ An agreement between two railroad companies that one might use the line of the other to pass over it with their engines, carriages, trucks, and carrying traffic, was held sufficiently definite, the court remarking that it meant, "a reasonable use, a use consistent with the proper enjoyment of the subject matter, and with the rights of the granting party."⁴ So, a contract entered into between a land-owner and a railroad company that the latter should make such roads, ways, and slips for cattle as might be necessary, the railroad having been constructed,

¹ Barry v. Coombe, 1 Pet., 640.

² Tallman v. Franklin, 14 N. Y., 584.

³ Lewis v. Reichy, 27 N. J. Eq., 240.

⁴ Gt. Northern R.R. Co. v. Manchester, Sheffield & Lincolnshire R.R. Co., 5 De G. & Sm., 138.

was held capable of being enforced.¹ An offer to sell for three thousand five hundred dollars, one thousand dollars down, and five hundred annually until the whole was paid, the amount unpaid to be secured by a mortgage with interest, was held to mean that the land was to be conveyed to the purchaser, who was to give back a mortgage on the land sold for the unpaid purchase money.² Where the owner of a section of land containing about eighty acres agreed to convey fifty-nine acres of it without defining the boundaries, the agreement was held sufficiently certain to authorize the court to decree the execution of a deed.³ Of course, if a written instrument contain all the facts of a contract except such as may be properly proved by parol,

¹ *Saunderson v. Cockermonth & Workington R.R. Co.*, 11 Beav., 497; *Parker v. Taswell*, 4 Jur. N. S., 183. A covenant that "If by the caving of the river bank the land conveyed should become valueless, the covenantor was to suffer the covenantee to fix another landing, not to exceed four acres, at any point on the river front of the plantation which the public interest might demand, and to execute to him a suitable conveyance therefor, with a suitable road not to exceed thirty feet in width leading to the same; it being the intention of the parties that by the payment of the sum of four thousand dollars the covenantee was to have a perpetual landing, and to have exclusive control of any landing on the river front of the plantation," does not indicate any want of definiteness or fairness, or show such hardship as should prevent it from being specifically enforced. *Carson v. Percy*, 57 Miss., 97.

² *Matteson v. Scofield*, 27 Wis., 671. In a suit for the specific performance of a contract for the sale of land, the following instrument, which was objected to as wanting in mutuality and certainty, was held valid and binding and capable of being enforced: "Received March 10th, 1874, from D. R., the sum of four hundred dollars on account of his purchase of the house and lot known and situate as No. 164 M. Street, J. C., sold to him this day for the sum of four thousand dollars. It is agreed that if the title of the above property shall prove unsatisfactory, that the above sum shall be returned to said D. R. J. G." "The judicial construction of the foregoing is, that one party binds himself to the other to convey on demand to be made within a reasonable time for a fixed price, and receives part of the purchase money at the making of the contract, which is to be returned to the purchaser if the title prove defective. Furthermore, the contract provides for a delivery of the deed on demand within a reasonable time, and a tender of the balance of the purchase money." *Reynolds v. O'Neil*, 26 N. J. Eq., 223.

³ *Ring v. Ashworth*, 3 Iowa, 452. Where A. entered into an agreement with B. to take B. into partnership "in a certain lot in the city of Jackson," B. to pay one-half of the purchase money, "being eighty-two and a half dollars," at a time specified, or forfeit his claim thereto if not paid within three months, and B. tendered the amount within the appointed time, which A. refused to receive, it was held on a bill filed by B. for specific performance that the contract was not void for uncertainty, all ambiguity therein having been removed by the answer. *Cornell v. Mulligan*, 21 Miss., 13 Smed. & Marsh., 388.

it is sufficiently certain to be enforced in equity.¹ The defendant purchased certain property, having previously agreed with the plaintiff that if he made the purchase he would convey a portion of it to the plaintiff. There was some uncertainty in the memorandum of agreement as to the exact portion which the plaintiff was to have. In a suit by the plaintiff for specific performance of the contract, the court directed a reference to chambers to ascertain what portion the plaintiff was entitled to, and decreed that the defendant should convey such portion to the plaintiff.²

§ 154. *Insufficient description of land.*—It is an established rule in equity that specific performance will not be decreed of an agreement for sale, whether verbal or written, unless the property to be conveyed is fixed with certainty as to the locality and description of the land, or in

¹ Waring v. Ayres, 40 N. Y., 357. See Dulany v. Rogers, 50 Md., 524; Cummings v. Steele, 54 Miss., 647. A description of the property in a covenant as the land "whereon the vendor resides," or as the "A. B. farm," is sufficient, provided it can otherwise be sufficiently identified. Simmons v. Spruill, 3 Jones Eq., 9. Where land was described as "lying on the south-west side of Black River, adjoining the lands of William Haffland and Martial," the description was held sufficient. Kitchen v. Herring, 7 Ired. Eq., 190. The following description in a contract of sale was held sufficiently definite to support a decree for specific performance: "Land lately bought by A. from B., to wit: a part bounded by the section line running from the north-east corner of said tract to the stake put by C. on the south-east; thence in a due north-east course until it strikes the main road; thence along the said road till it strikes the northern line of said tract; thence to the beginning." Hooper v. Laney, 39 Ala., 338. The description in a deed located the land on the south side of a river, and also referred to a patent which placed the land on the west side. Held that such discrepancy was immaterial, the identity sufficiently appearing, and that specific performance must be decreed. Newsom v. Davis, 20 Texas, 419. A contract for the sale of land which was definite in all respects excepting that it omitted to state the town in which the land lay, was held sufficiently certain to be enforced. Robeson v. Hoonbaker, 3 N. J. Eq. (2 Green), 60. And the same was held of a contract for a conveyance of a right of way in which the length of the way was not stated with certainty, but the terminal points and line of way were so fixed as to be readily determinable by the government surveys. Puttmann v. Haltey, 24 Iowa, 425. So, where a grantor agreed to convey a right of way eighty feet wide over a tract of land, and the grantee subsequently entered and laid out his road with the acquiescence of the grantor, the contract was held sufficiently definite to be enforced in equity. Purinton v. Northern Ill. R.R. Co., 46 Ill., 297.

² Chattock v. Muller, L. R. 8, Ch. D. 177. In this case the defendant had purchased part of the property as the agent of the plaintiff, and refused to convey any portion of it to him, in flagrant breach of duty and fraudulent denial of the plaintiff's rights.

such way that it can be ascertained with certainty.¹ A contract which recited that a specified sum was to be paid at a given time "for one hundred and twenty acres of land in Shannon Co., Missouri, provided it is not sold before that time," was held too indefinite to be enforced;² and the same was held as to a contract "for the sale of the houses in Smithfield Street," without any further description, and without disclosing to whom they belonged;³ also where the language of an agreement was as follows: "I have this day sold to D. a certain tract of land containing nine acres and sixty-six poles near the junction of Broad Street, Nashville, and the Hillsboro turnpike, Davidson Co., Tennessee, for the sum of four thousand dollars."⁴ A reservation by the vendor in a contract for the sale of real estate of "the necessary land for making a railway through the estate to Prince Town" is void for uncertainty, and the contract is incapable of being enforced on that ground.⁵ Where A. subscribed "fifty dollars and the lot to build on" to a subscription paper to build a church, without stating the extent or boundaries of the lot, and after his death, the church, a corporation, filed a bill for specific performance against his devisee, it was held that the agreement could not be enforced, it not being definite enough to take it out of the statute of frauds.⁶

¹ Camden & Amboy R.R. Co. v. Stewart, 18 N. J. Eq., 489; McGuire v. Stevens, 42 Miss., 724; Whelan v. Sullivan, 102 Mass., 204; Ellis v. Deadman, 4 Bibb., 467; Johnson v. Craig, 21 Ark., 533; Jordan v. Fay, 40 Me., 130; Graham v. Hendren, 5 Munf., 185; Parish v. Koons, 1 Pars. Eq. Pa., Sel. Cas., 79; Jordon v. Deaton, 23 Ark., 704; Ferris v. Irving, 28 Cal., 645; Millard v. Ramsdell, Harr. Mich., 373; Shelton v. Church, 10 Mo., 774; Camden, etc., R.R. Co. v. Stewart, 18 N. J. Eq., 489; Prater v. Miller, 3 Hawks, 628; Copps v. Holt, 5 Jones Eq., 153; Patrick v. Horton, 3 W. Va., 23; Taylor v. Ashley, 15 Texas, 50; Brackin v. Hambrick, 25 Ib., 408.

² Miller v. Campbell, 52 Ind., 125. See Lynes v. Hayden, 119 Mass., 482.

³ Hammer v. McEldowney, 46 Pa. St., 334.

⁴ Dobson v. Litton, 5 Coldw. Tenn., 616.

⁵ Pearce v. Watts, L. R. 20, Eq. 492.

⁶ Church of the Advent v. Farrow, 7 Rich. Eq., 378. If the agreement does not consist of parts which are separable, certainty of description must, of course, extend to the entire property. Where a contract to convey several tracts of land did not describe some of them with sufficient certainty, it was held that such

§ 155. *Failing to designate the person who is to take.*—When there is a want of certainty as to whom a conveyance or devise is to be made, specific performance will not be decreed. It was held to be an insuperable difficulty in the way of maintaining a suit for the specific performance of a contract to convey or devise a house and lot, that it was doubtful who the parties were to whom the conveyance or devise was to be made;¹ and where the owner of real estate promised in a general way to establish a right to pass over it, but made no specific contract with any person permitting him to do so, the court refused to interfere.² A. agreed, in consideration that B. would take care of and support him for life, to assure to B. and his family A.'s house and lot after death, to be secured by a deed in escrow, the title to be given to such members of the family of B. as A. might choose. The family of B. consisted of himself, wife, and four daughters, and it was held that unless A. prior to his decease designated the particular members of the family of B. who should take the land under the contract by some irrevocable act, or by some act which, if not irrevocable, was not in fact revoked by him, specific performance could not be decreed.³

§ 156. *Contracts objectionable for uncertainty.*—Numerous examples of contracts too uncertain to be enforced are given in the books. This was held in relation to a contract for a lease which provided that the house should be put in repair and handsomely decorated;⁴ also as to a contract for sale, reserving "the necessary land for making a railway through the estate";⁵ likewise of an agreement which left it

part could not be rejected as immaterial, and a performance ordered of the residue upon payment. *King v. Ruckman*, 20 N. J. Eq., 316. As to how the lines should be run when a purchaser has his election of a portion of a tract of land, "to be laid off at either end, side, or edge," see *Owings v. Morgan*, 4 Bibb., 274. As to the quantity of land to which it was held a party was entitled, see *Ashcraft v. Brownfield*, 7 B. Mon., 123.

¹ *Stanton v. Miller*, 58 N. Y., 192.

² *Hall v. McLeod*, 2 Metc. Ky., 98.

³ *Stanton v. Miller*, *supra*.

⁴ *Taylor v. Portington*, 7 De G. M. & G., 328.

⁵ *Pearce v. Watts*, L. R. 20, Eq. 492.

doubtful whether or not the purchase money included the timber;¹ of a mortgage which referred to no specific property, where the rights of third parties had intervened;² of an agreement by a landlord to renew the lease for as much as any one else would pay, with option on the part of the lessee to accept or refuse the lease;³ of the promise of a landlord to reduce the rent in consequence of the lessened value of the premises caused by the destruction of a bridge, the tenant having threatened to quit unless this were done;⁴ of an agreement to give two mortgages in part payment for the purchase of land, without stating when they were to be paid, or at what rate of interest;⁵ so of a contract for the sale of land for twenty-five thousand dollars, and mortgage to remain at five per cent. for five years;⁶ also, where the consideration named in a contract for sale was, that the purchaser should erect on the land "a certain building";⁷ so of a resolution of the board of directors of a company that "two acres be sold";⁸ also of an agreement for the sale of land, of which there was no written evidence, except a receipt for part of the purchase money defining the lot sold, but not naming the price or any other terms of sale.⁹ So an engagement by the actor Kean to perform at a theatre was held incapable of enforcement by reason of its uncertainty. "Independently of the difficulty of compelling a man to act," said the court, "there is no time stated, and it is not stated in what character he shall act; and the thing is altogether so loose, that it is perfectly impossible for the court to determine upon what scheme of things Mr. Kean shall perform the agreement";¹⁰ but the court will endeavor

¹ Reynolds v. Waring, You., 346.

² Day v. Griffith, 15 Iowa, 104.

³ Gelston v. Sigmund, 27 Md., 334. ⁴ Smith v. Ankrim, 13 Serg. & Rawle, 39.

⁵ Nichols v. Williams, 22 N. J. Eq., 63.

⁶ Grace v. Denison, 114 Mass., 16.

⁷ Mastin v. Halley, 61 Mo., 196.

⁸ Carr v. Passaic Land, etc., Co., 22 N. J. Eq., 85.

⁹ Soles v. Hickman, 20 Pa. St., 180.

¹⁰ Kemble v. Kean, 6 Sim., 333. The court, on the ground of uncertainty, refused to decree a specific performance of marriage articles prepared by a Jewish rabbi in an obscure manner said to prevail among the German Jews. Franks v. Martin, 1 Ed., 309.

to put a reasonable interpretation upon vague expressions in an agreement.¹

§ 157. *Inconsistent or ambiguous stipulations.*—If the language of the contract is contradictory, or there are two different agreements in relation to the same subject matter, specific performance will in general be refused.² Where an agreement to take the lease of a house for a specified term, at a given rent, provided the house were thoroughly repaired, recited that the drawing-rooms were to be handsomely decorated in accordance with the then existing style, and made some further requirements as to painting, a bill for specific performance was dismissed on the ground of uncertainty as to repairs.³ So, a contract for the purchase of "the land required" for the construction of a railroad, and which contained provisions agreed on between the agents of the company and the vendor, as to roads, culverts, etc., was held, on appeal, reversing the decision of the court below, "too vague, too uncertain, too obscure, to enable the court to act with safety or propriety."⁴ The same was held of an agreement in general terms for the construction of a railroad according to specifications to be prepared by the engineer of the company for the time being;⁵ and also

¹ *Saunderson v. Cockermouth & Worthington R.R. Co.*, 11 Beav., 497; *White v. Hermann*, 51 Ill., 243. A written contract in terms "I will sell W. W. at any time within three months from April first, eighteen fifty-seven, the premises, (describing them) for the sum of six thousand five hundred dollars, upon the terms as specified," does not bind the owner of the land, and will not be enforced in equity by a decree for its specific performance; and parol evidence is not admissible to show a verbal agreement fixing the time and manner in which the consideration was to be paid. *Wright v. Weeks*, 3 Bosw., 372. On a parol agreement (perhaps not within the statute of frauds), where it was doubtful whether the contract stipulated that the plaintiff should have immediate possession, or not till a certain time after payment, and the plaintiff refused to make payment unless possession was immediately given, it was held that where the evidence leaves any of the essential terms of the contract doubtful, specific performance should not be decreed. *Tierman v. Libney*, 24 Wis., 190.

² *Callaghan v. Callaghan*, 8 Cl. & Fin., 374. ³ *Taylor v. Portington*, *supra*.

⁴ *Lord James Stuart v. London and Northwestern R.R. Co.*, 15 Beav., 513; *S. C.*, 1 De G. M. & G., 721. In the court below, the master of the rolls held that a surveyor going on to the land with the contract, could accurately ascertain the land to be taken, and that therefore the terms of the contract were sufficiently certain.

⁵ *South Wales R.R. Co. v. Wythes*, 5 De G. M. & G., 880.

of an agreement to furnish accommodation to the plaintiffs for the sale of their articles in the refreshment rooms of the defendants, and to fit the rooms up for that purpose.¹ So, where on the sale of land it was agreed that, in the event of there being coal or iron stone under the land, a royalty of a specified sum per ton should be paid thereon by the purchaser, and that any mines required to be left by a certain railroad company, should be paid for out of the money to be received from such company, the court declined to interfere, inasmuch, as if the company bought the mines, the contingency whether there was coal or iron stone under the land, would remain undetermined; and as the parties seemed to have intended that there should be a reservation of mines to the vendor, and a lease of them by the vendor to the purchaser, there was nothing to guide the court as to the stipulations to be contained in such a lease.² Where a contract is sought to be enforced by assignees or representatives of contracting parties, the rule that uncertainty will vitiate an agreement will be applied with more than ordinary stringency.³

§ 158. *Contract improperly obtained.*—A contract to be specifically enforced, must not only not be one-sided, unjust, and unfair, but it must not have been obtained by unscrupulous means, or by the concealment of material facts. It may be free from actual fraud or illegality, and not contain elements of hardship or oppression, and yet be so unequal as to be incapable of specific enforcement. Not that the court will nicely weigh the relative advantages or disadvantages of a bargain fairly made; but it will consider whether the agreement is such an one as a court seeking to do equity ought to compel a party to perform.⁴ On the other hand,

¹ Paris Chocolate Co. v. Crystal Palace Co., 3 Sm. & Gif., 119.

² Williamson v. Wooton, 3 Drew, 310. And see Harnett v. Yielding, 2 Sch. & Lef., 549; Tatham v. Platt, 9 Hare, 660; Taylor v. Gilbertson, 2 Drew, 391; Holmes v. Eastern Counties R.R. Co., 3 K. & J., 675; Sturge v. Midland R.R. Co., Week. Rep., 1857-1858, 233.

³ Odell v. Morin, 5 Oregon, 96.

⁴ Mortlock v. Buller, 10 Ves., 292; Willan v. Willan, 16 Ib., 83; Joynes v. Statham, 3 Atk., 388; Frisby v. Ballance, 4 Scam., 287; Gasque v. Small, 2

specific performance of a contract entered into under circumstances of unfairness, will, in general, be refused, although such unfairness was unintentional. Thus, where, at an auction sale, the solicitor, who was known to be the agent of the vendor, bid for the purchaser at his instance, and the bids, from the known relationship of the solicitor to the vendor, were supposed to be those of a puffer, and so, hurt the sale, specific performance was refused at the suit of the purchaser, though the act of the solicitor was inadvertent.¹ The unfairness of the contract may appear from its terms, or it may be shown by matters extrinsic, and proved by parol evidence. Hardship, inadequacy or failure of consideration, want of mutuality, and misrepresentation, fraud, or mistake, which necessarily involve unfairness, will be discussed in subsequent chapters.

§ 159. *Circumstances tending to throw discredit on transaction.*—In looking at a contract with reference to its fairness, regard will, of course, first be had to the subject matter, terms, and the manner in which it was executed, as well as to the price as compared with the real value of the property; and then to the circumstances under which the contract was entered into, particularly the character of the parties and the relation they sustain toward each other, such as the mental condition of the person against whom specific performance is sought, his age, or poverty, or his acting without an attorney when incompetent to take care of his

Strobb. Eq., 72; Lear v. Chouteau, 23 Ill., 39; Bowman v. Cunningham, 78 Ib., 48; Union Coal Mining Co. v. McAdam, 38 Iowa, 663; Crane v. Decamp, 21 N. J. Eq., 414; Reese v. Reese, 41 Md., 554; Godwin v. Collins, 4 Houst. Del., 28; Davis v. Symonds, 1 Cox, 402; Cabeen v. Gordon, 1 Hill Ch., 51; Modisett v. Johnson, 2 Blackf., 431; Edwards v. Handley, Hard. Ky., 602; Garnett v. Macon, 6 Call, Va., 308; 2 Brock, 185. And see Walker v. Hill, 21 N. J. Eq., 191; Merritt v. Brown, Ib., 401.

¹ Twining v. Morrice, 2 Bro. C. C., 326. The equality required in contracts, consists partly in acts, and partly in the subject matter of the contract. As to the precedent acts, equality is required between the parties, both as to the knowledge of the thing, and the exercise of the will. As to the principal act, the equality required is, that more be not demanded than is just. As to the subject matter, the equality is to be sought in the absence of all hidden defects in it, or mistakes as to it. Grotius, de jure Belli ac pacis, Lib. 11, Ch. 12, Sec. 3, *et seq.*

own interests, etc.¹ When there is evidence to show that there was not a full, entire, and intelligent consent to the contract by the party against whom performance is sought, or that it was entered into under circumstances of surprise, or want of advice, or that one of the parties was an illiterate person, or in distress, the court will be reluctant to compel him to perform.² An agreement to convey real estate bound the vendor to sell the property at a fixed price; five thousand dollars to be paid on the delivery of the deed, and the balance in instalments, without providing for any mortgage or security for the purchase money, and without any time being designated for completion. The contract was drawn by the vendee, and was signed by the vendor, a female not versed in such matters, in the absence of any legal adviser, when she had been a long time an invalid, confined to her house by illness, in embarrassed circumstances, and it appeared that she was urged to execute it by the plaintiff. Moreover, she signed the contract under a misapprehension as to the payments, supposing that the whole purchase money was to be paid in cash. The terms of the agreement were not fair and just, and the circumstances under which it was executed being such as to render it very doubtful whether it was understood by the defendant in such a way as to make a valid contract on her part, or at any rate so clearly as to call for a decree for specific performance, it was held that the suit could not be maintained, although the court did not impute to the purchaser any intentional

¹ *Gartside v. Isherwood*, 1 Bro. C. C., 558; *Bell v. Howard*, 9 Mod., 302; *Martin v. Mitchell*, 2 J. & W., 413, 423; *post*, § 162.

² The term surprise is sometimes used as synonymous with that of fraud. But the common definition of surprise, is the act of taking unawares; the state of being taken unawares; sudden confusion or perplexity. When a court of equity relieves on account of surprise, it does so, upon the ground that the party has been taken unawares, that he has acted without due deliberation, and under confused and sudden impressions. Cases in which the word surprise is used in a more lax sense, are those where it is deemed presumptive of, or approaching to, fraud. See Story's Eq. Juris., Sec. 120, *note*.

³ *Stanley v. Robinson*, 1 R. & M., 527; *Helsham v. Langley*, 1 Y. & C. C. C., 175; *Stearns v. Beckham*, 31 Gratt., 379.

deception or fraud.¹ Where the owner of real estate in a city, with a very imperfect knowledge of the English language, was persuaded by a person to sign a paper constituting such person his agent to sell for him the land, which was done for a sum much below its value, and such person, who was the agent of the buyer, concealed from the owner facts which would have prevented the sale at the price named, it was held that the contract thus entered into was too unfair, unjust, and inequitable to be specifically enforced.² Where an inexperienced young man twenty-one years of age, after a slight examination of real estate insufficient to learn its value, and without advice, entered into a contract for its purchase at an exorbitant price, with a person superior to him in intelligence, who exaggerated the importance of the property, specific performance was refused at the suit of the vendor, although there was no actual fraud.³ In a suit for the specific performance of a contract for the sale of real estate, it appeared that the price agreed upon was three or four times less than the value of the land; that the vendee was eager to purchase, and repeatedly visited the vendor for that purpose, at a time when the property was under lease, so that possession could not be immediately obtained; that the vendor was a young, inexperienced man just of age, who knew nothing of the value of the land, and that he wished before selling to consult a friend, which he was given no opportunity to do. The court held that although the circumstances did not show fraud or imposition on the part of the vendee, yet that they were such as to indicate unfairness, and that the bill must be dismissed with costs.⁴ Where in a suit for specific performance, it appeared that the complainant had obtained a judgment against the defendant in an action for unlawfully retaining certain real estate worth three hundred dollars, to

¹ Cuff v. Dorland, 55 Barb., 497. See Falke v. Gray, 4 Drew, 651.

² Fish v. Leser, 69 Ill., 394.

³ Gasque v. Small, 2 Strobh. Eq., 72.

⁴ Clitherall v. Ogilvie, 1 Desaus Eq., 250.

which the defendant claimed title, and on which he had a growing crop, and having issued a writ of restitution, procured the defendant to enter into an agreement by which he promised, in consideration of the complainant's note for thirty dollars, to surrender the land at the expiration of four months and a half, and to give to the complainant his bond for title, the bill was dismissed with costs; the court remarking that it was evident that the defendant did not enter into the contract voluntarily, but that the writ of restitution was held *in terrorem* over him, and that it was incumbent on the complainant, who invoked the exercise of the court's discretion in his behalf, to show that he had not extorted an unreasonable bargain; that he had given a just compensation for the land, and was equitably entitled to it.¹ Where, however, the agreement is not objectionable in itself, the fact that it was made by a person in insolvent circumstances, or in prison, will not prevent its being specifically enforced.²

§ 160. *Inadvertent omission of term.*—If, in consequence of haste or inadvertence in drawing or signing a contract, a material term is left out which the parties meant should be inserted, specific performance will not be decreed; as in such a case, the instrument does not truly represent their agreement, but something different.³ Where a contract for the sale of land provided that one-half of the

¹ Blackwilder v. Loveless, 21 Ala., 371.

² Lightfoot v. Heron, 3 Y. & C. Ex., 586; Haberdasher's Co. v. Isaac, 3 Jur. N. S., 611; Brinkley v. Hance, Dru., 175. If process be sued out maliciously, and without probable cause, though in form regular and legal, to arrest and imprison a person, and a deed is obtained from him while thus arrested to procure his release, by reason of threats of severe personal injury, such as death, illegal imprisonment, or loss of limb, his contract is void, though upon good consideration. But it is otherwise as to a contract obtained by the threat of a mere battery, or of a trespass to land or goods, it being presumed that such a threat will not coerce a firm and prudent man. *Duress* as a defence to a contract, is, like infancy, a personal privilege. A party, therefore, cannot plead that he entered into a bond or other contract with another on account of duress upon the latter. So, a person cannot set up such a defence, unless the contract is made with the one at whose suit or instigation he is imprisoned, or who makes the threats.

³ Morganthau v. White, 1 Sweeny, 395; Harnett v. Baker, L. R. 20, Eq. 50. See *post*, § 368.

purchase money should be paid by the purchaser on the day possession was given, and the balance in annual instalments of five hundred dollars each, and the customary provision for securing the deferred payments was omitted through an oversight due to the hasty conclusion of the contract, caused by the vendee, but without any improper design, it was held that as such contract, if enforced according to its terms, would work injustice between the parties, specific performance would not be decreed, and that the court had no power to supplement the contract by prescribing some mode of security.¹

§ 161. *Concealment of facts without fraud.*—The improper suppression of a material fact known to one of the parties, which, under the circumstances, he is bound in conscience to disclose, and by which he obtains an advantage over the other party not embraced in the bargain, and consequently lacking the assent of such other party, though not amounting to fraud, by rendering the contract unequal, will prevent its specific enforcement;² as where

¹ Godwin v. Collins, 4 Houst. Del., 28. If, in the foregoing case, the purchaser had made his first payment and gone into possession under the contract, he would have been protected on the ground of part performance; and upon payment of the balance of the purchase money he could have compelled the vendor to convey the land. Equity in decreeing specific performance, sometimes imposes upon a party terms not stipulated for in the contract. This has been done when performance having been partially made, completion according to the strict terms of the contract has become impracticable; as through some defect of title, or outstanding incumbrance, or change in the condition of the property. In such case, where the parties have already acted under the contract, and their interests have become so involved that they cannot be put in the position they were in before, the court, in order to prevent injustice, will complete the execution of the contract, making such equitable adjustment between the parties by way of compensation or indemnity as circumstances may admit. Davis v. Hone, 2 Sch. & Lef., 341; Young v. Paul, 2 Stockt., 402. When a married woman has attempted to convey her estate, but the conveyance is defective for want of compliance with the statute, there is not a valid contract which can be specifically enforced. But if she has sold her land, received the purchase money, and executed a deed in accordance with the statute, and perfect except in the description of the land, the mistake in the description may be corrected as against her or her heirs. Hamar v. Medsker, 60 Ind., 413.

² Smith v. Harrison, 26 L. J. Ch., 412. It has been said that "as a general rule, each party is bound in every case to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation." 2 Kent's Com., 482. But the foregoing proposition has been justly criticised as too broad, "for many most material facts may be unknown to one party, and

it was necessary that a wall should be repaired to protect the property from the incursions of a river, and this was concealed.¹ So, where a person contracted to sell his land to another for a half-penny a square yard, which amounted to about five hundred pounds, when the land was in reality worth two thousand pounds, which, the purchaser knowing, suppressed; it was held that the concealment avoided the sale.² So, it having been shown in a suit for the specific performance of a contract to convey a lot of land, that the plaintiff lived near the lot, and was acquainted with its value, while the defendant resided at a distance, and did not know what it was worth, and that although the plaintiff made no misrepresentations, yet that he concealed his knowledge of the recent rise in value of the lot, and took advantage of the defendant's ignorance, and thus obtained from her a contract to sell him the lot for but little more than one-third its value, it was held that the plaintiff was not entitled to a decree.³ Where the

known to the other, and not equally accessible, or at the moment within the reach of both; and yet contracts not founded upon such ignorance on one side, and knowledge on the other, may be completely obligatory." 1 Story's Eq. Juris., Sec. 207. The relation sustained by one party toward the other may be such as to make it his duty to disclose the facts; as that of a confidential adviser or attorney; or where one from a long course of dealing has been in the habit of trusting implicitly the representations of the other; or one has sources and means of information not open to the other; or is so situated that he is compelled to depend upon the statements communicated to him. The subject of concealment most usually arises in suits for the setting aside of contracts on the ground of mistake or fraud, where it is claimed that facts have been suppressed by a party which he was in duty bound to disclose to the other party, and in respect to which he could not innocently be silent. For a full exposition of the true rule, the reader is referred to Ch. 10, *post*.

¹ Shirley v. Stratton, 1 Bro. C. C., 440.

² Deane v. Rastron, 1 Ans., 64.

³ Margraff v. Muir, 57 N. Y., 155. In this case, the referee before whom the suit was tried, denied the equitable relief, but allowed the plaintiff as damages the difference between the contract price and the value of the land, thus placing him in the position he would have been in if the contract had been performed. It was held error; that the plaintiff was only entitled to nominal damages, together with the sum paid by him on the contract. The general rule in New York, in the case of executory contracts for the sale of land, is, that where there is a breach by the vendor, the vendee can only recover nominal damages, unless he has paid part of the purchase money, when he can also recover the purchase money and interest. Margraff v. Muir, *supra*, per Earl, C., citing Mack v. Patchin, 42 N. Y., 167; Bush v. Cole, 28 Ib., 261; Pumpelly v. Phelps, 40 N. Y., 60. But to this rule there are numerous exceptions, based upon the wrongful conduct of the vendor; as if he is guilty of fraud, or can convey, but will

parties were negotiating for the sale and purchase of certain property, and while the negotiation was still pending between them, the proposed vendee took a contract from the agents of the vendor without disclosing it to the vendor in any subsequent interview, although the parties resided in the same city, and a few minutes' walk would have brought them together, and the agents of the vendor executed and delivered to the vendee what purported to be the contract of the vendor for the sale of the property, which would tie up, for an indefinite period, very valuable real estate for a nominal sum, and they did not require the vendee to sign the contract, nor to give any security for its performance on his part, it was held that there was no contract between the parties so fairly obtained, as that a court of equity would enforce it.¹ So, where the solicitor who acted for both the vendor and purchaser, did not disclose to both of them all the facts, so as to place them on an equality in the transaction, specific performance was refused at the suit of the purchaser.² And where a tenant obtained a renewal of his lease on the surrender of the old one, knowing and concealing the fact of which the lessor had no knowledge, that the person on whose life the original lease depended was at the point of death, the court refused to aid the lessee.³

§ 162. *Objection that party was in a condition affecting his capacity.*—Whether the fact that a party, when he entered into a contract, was under the influence of spirituous liquor will be deemed such evidence of unfairness as to induce the court to withhold a decree for specific performance against him, will depend upon his condition at that

not, either from perverseness, or to secure a better bargain ; or if he has covenanted to convey when he knew he had no authority to contract to convey ; or where it is in his power to remedy a defect in his title, and he refuses or neglects to do so ; or when he refuses to incur such reasonable expenses as would enable him to fulfil his contract. Ib.

¹ Taylor v. Merrill, 55 Ill., 52. See Fish v. Leser, 69 Ib., 394.

² Hesse v. Briant, 6 De G. M. & G., 623.

³ Ellard v. Lord Llandaff, 1 B. & B., 241.

time. Such a circumstance will not constitute a defence, if there be nothing to show that the party acted without a full understanding of what he was doing.¹ But, on the other hand, if it be shown that the defendant was in a state of complete intoxication, the court will not assist the plaintiff in enforcing the agreement, even where there is nothing to show that he took advantage of the defendant's situation.² While, however, equity will be reluctant to aid one who has obtained an agreement from an intoxicated

¹ *Lightfoot v. Heron*, 3 Y. & C. Ex., 586; *ante*, §§ 122, 159.

² *Cooke v. Clayworth*, 18 Ves., 12; *Nagle v. Baylor*, 3 Dr. & W., 60. It seems to have formerly been held that the agreement of a party was not void even in equity although made by him in a state of complete intoxication, unless such intoxication was caused by the fraud or contrivance of the other party. *Cory v. Cory*, 1 Ves., 19; *Stockley v. Stockley*, 1 V. & B., 23. But the contrary is now well established, on the ground that a party in a condition of absolute drunkenness has "no agreeing mind." *Pitt v. Smith*, 3 Camp, 33; *Fenton v. Holloway*, 1 Stark, 126; *Prentice v. Achorn*, 2 Paige Ch., 30; *Duncan v. M'Cullough*, 4 Serg. & Rawle, 484; *Ford v. Hitchcock*, 8 Ohio, 214; *Broadwater v. Darne*, 10 Mo., 277; *Harrison v. Lemon*, 3 Blackf., 51; *Hotchkiss v. Forston*, 7 Yerg., 67; *Calloway v. Witherspoon*, 5 Ired. Eq., 128; *Donelson v. Posey*, 13 Ala., 752; *Lavette v. Sage*, 27 Conn., 577. But see *Pittinger v. Pittinger*, 2 Green Ch., 156. In *Campbell v. Spencer*, 2 Binney, 129, which was an action of ejectment brought by the vendor of land to compel the specific performance of a contract of sale, the court sustained the verdict of a jury in favor of the defendant, on the ground that the circumstances were such as to lead to the suspicion that the defendant, under the influence of liquor while making the contract at a tavern with the plaintiff, who had sent for him to come there, although not drunk, had unadvisedly sold his farm, on which he had resided many years, for store goods. "Where the defendant happens to be a man of weak mind, or has rendered himself, by his intemperate habits, incapable of managing his business and his estate in a provident manner, and if inadequacy of price could be shown, it ought to excite a jealousy that would induce a strict examination in order to be satisfied that everything was fair in obtaining the contract. And if, in addition to inadequacy of price, it should also appear that the defendant was hurried into the contract without having time sufficient allowed him to reflect on what he was doing, or to consult with his friends about it, where it was a matter of any magnitude; or even where the price agreed to be given to such person might be fully equal in value to that part of the estate agreed to be sold when separated and detached from the rest of it, but such separation would injure and deteriorate the value of the residue greatly beyond the value of the price that was to be received for it, a specific performance ought not to be enforced. In short, if the contract of a party seeking the specific performance of a contract be not perfectly conscientious, honorable, and fair, or if the contract itself be such that a specific performance thereof would necessarily in its consequences to the defendant produce a loss or injury greatly above the value of the price to be received by him under the contract, and which could not have been readily foreseen unless by a man perfectly competent to the management of all his concerns, possessing at the time an unclouded mind free from embarrassment, and capable of deliberating and reflecting maturely on what he was about to do, a specific performance, according to the established principles of equity, ought not to be enforced." *Henderson v. Hayes*, 2 Watts, 148.

person, it will be equally unwilling, in the absence of fraud or imposition, to help the latter get rid of his contract on the ground that he was intoxicated at the time.¹ Where a third person, who had obtained a subsequent conveyance of the property, was the substantial defendant, he was not permitted to set up this defence.²

§ 163. *It here contract may affect others injuriously.*—The rights of persons not parties to the contract of which specific performance is sought are equitable considerations to be looked at by the court, although such rights vested subsequent to the making of the contract.³

§ 164. *In case of breach of trust.*—A contract of sale made by trustees in breach of their trust will not be specifically enforced, because such a contract would not only be unfair and unlawful, but would render the trustees liable to prosecution if they were compelled to execute it.⁴ Where, in a contract for the sale of trust property, it was agreed

¹ Rich v. Sydenham, 1 Ch. Cas., 202; Wigglesworth v. Steers, 1 Hen. & Munf., 70; White v. Cox, 3 Hayw., 82; Taylor v. Patrick, 1 Bibb., 68; Campbell v. Ketcham, Ib., 406.

² Shaw v. Mackray, 1 Sm. & G., 537.

³ Wedgwood v. Adams, 6 Beav., 600; Anthony v. Leftwitch, 3 Rand, 238; Towan v. Barrington, Brightly (Pa.), 253; Patterson v. Martz, 8 Watts, 374; Johnson v. Hubbell, 2 Stoct. Ch., 332; Curran v. Holyoke Water Power Co., 116 Mass., 90. Mr. Fry (Specif. Perform., 112, 113), gives the following examples under the system of family settlements prevailing in England: Where an estate was settled in strict settlement, giving to the settlor a life estate and an ultimate remainder, and the tenant for life contracted for the sale of the fee, the purchaser was not permitted to take the interest of the tenant for life with compensation, for the reason that a father and a stranger would be likely to use an estate without impeachment of waste in a different way, and that consequently the sale might prove injurious to those in remainder. Thomas v. Dering, 1 Ke., 729. So, a settlor in a voluntary settlement cannot maintain a suit for the sale of the estate so as to override the settlement and thus prejudice the interests of the parties claiming under it. Johnson v. Legard, T. & R., 281.

⁴ Mortlock v. Buller, 10 Ves., 292; Bridger v. Rice, 1 J. & W., 74; Wood v. Richardson, 4 Beav., 174; Maw v. Topham, 19 Ib., 576; Hill v. Buckley, 17 Ves., 394; Neale v. Mackenzie, 1 Ke., 474. The person who seeks specific performance must show that "he does not call upon the other party to do an act which he is not lawfully competent to do; for if he does, a consequence is produced that quite passes by the object of the court in exercising the jurisdiction, which is, to do more complete justice." Lord Redesdale in Harnett v. Yielding, 2 Sch. & Lef., 553. Where a trustee has authority to sell and reinvest the trust property whenever, in his judgment, the purchase money can be laid out advantageously for the *cestui que trust*, the sale will be void unless he acts in the matter fairly and honestly. Wormley v. Wormley, 8 Wheat., 421.

that the purchaser should retain, out of the purchase money, the amount of a private debt due to him from the trustee, a demurrer to the bill for want of equity was sustained on the ground that the agreement constituted a breach of trust.¹ And even though the contract do not amount to a breach of trust, but be merely unbusiness-like, the court will be reluctant to enforce it, unless it is shown that the price is fully equal to the value of the property.² So, "if trustees fail in reasonable diligence—if they contract under circumstances of haste and improvidence—if they make the sale with a view to advance the particular purposes of one party interested in the execution of the trust at the expense of another party—a court of equity will not enforce specific performance of the contract, however fair and justifiable the conduct of the purchaser may have been. The remedy of the law is open to such a purchaser; but he has no claim to the assistance of the court of equity."³ So, specific performance will be refused when trustees enter into an agreement in excess of their authority.⁴ And where trustees for sale misrepresented the value of the property when they had it in their power to estimate it correctly, and the conditions of sale contained stipulations for compensation on either side, a decree for compensation was reversed, the court refusing to carry out a condition which would injure the *cestui que trust* through the neglect of the trustees.⁵ But a contract for sale entered into by the trustees of a road, was enforced, although the agreement was made in forgetfulness of a right of preemption, and the trustees might be liable to an action for damages.⁶ A contract en-

¹ Thompson v. Blackstone, 6 Beav., 470.

² Goodwin v. Fielding, 4 De G. M. & G., 90.

³ Ord v. Noel, 5 Mad., 438, per Sir John Leach, V. C.

⁴ Harnett v. Yielding, *supra*; Byrne v. Acton, 1 Bro. P. C., 186; Bellinger v. Blagrove, 1 De G. & S., 63.

⁵ White v. Cuddon, 8 Cl. & Fin., 766, overruling Cuddon v. Cartwright, 4 Y. & C. Ex., 25. And see Sneesby v. Thorne, 1 Jur. N. S., 536; S. C. 7, De G. M. & G., 399; Margram v. Archbold, 1 Dow, 107.

⁶ Barrett v. Ring, 2 Sm. & Gif., 43.

tered into by an agent in gross breach of trust toward his principal, will not be enforced ;¹ nor an agreement made by railway directors in breach of trust, to the prejudice of the stockholders at the instance of the other party who had knowledge of the circumstances.² The doctrine under consideration is applicable to assignees in bankruptcy, and all other persons holding positions of trust and confidence. A contract for sale entered into by assignees in bankruptcy where the purchaser must have known that the vendors were dealing without sufficient knowledge, and that the creditors were equally ignorant, was set aside on the ground of the breach of trust of the assignees.³

§ 165. *Subsequent changed circumstances.*—As a rule, subject to exceptions, if the contract was fair when it was entered into, it will not be deemed otherwise, in consequence of the happening of unforeseen and unexpected events afterward.⁴ “The question in such cases always is, was the contract at the time it was made a reasonable and fair one? If such were the fact, the parties are considered as having taken upon themselves the risk of subsequent fluctuations in the value of the property, and such fluctuations are not allowed to prevent its specific enforcement.”⁵

¹ *Mortlock v. Buller*, 10 Ves., 292, 313.

² *Shrewsbury & Birmingham R.R. Co. v. London & Northwestern R.R. Co.*, 4 De G. M. & G., 115; *Affid.* 6 House of Lds., 113.

³ *Turner v. Harvey*, Jac., 169.

⁴ *Low v. Treadwell*, 12 Me., 441. Mr. Story states an exception to the rule very broadly when he says that “If, in fact, the character and condition of the property to which the contract is attached, have been so altered that the terms and restrictions of it are no longer applicable to the existing state of things; in such cases, courts of equity will not grant any relief, but will leave the parties to their remedy at law.” *Story’s Eq. Juris.*, Sec. 750; referring to *Duke of Bedford v. British Museum*, 2 Mylne & Keen, 552. See *Payne v. Meller*, 6 Ves., 349; *Pratt v. Law*, 9 Cranch, 456; *Brashier v. Gratz*, 6 Wheat., 528; *Mechanic’s Bank of Alexandria v. Lynn*, 1 Peters, 383; *Taylor v. Longworth*, 14 Ib., 173.

⁵ *Field, J.*, in *Willard v. Tayloe*, 8 Wall, 557. The foregoing case is sometimes referred to as having departed from the general rule. It seems, however, that the contract was enforced according to the presumed intention of the parties at the time it was entered into; that is, that the consideration should be paid in the standard of values which existed at that time, and not in a depreciated currency subsequently created, which neither party could have contemplated. It was a suit for the specific performance of a covenant contained in a lease of certain real estate to the complainant, in which it was stipulated that the com-

The rule is especially, if not universally, applicable to "contracts which do not look to a completed performance within a defined and reasonable time, but contemplate a continuous performance extending through an indefinite number of years, or perpetually."¹ But if the subsequent changed circumstances and conditions, which are objected to by the defendant as unfair, were caused by the plaintiff's wrongful acts or omissions, it will be a ground for refusing to enforce specific performance.²

§ 166. *Sales of doubtful rights*.—A contract may be fair, and therefore binding, when the uncertainty is either in some future and doubtful event, or when something past, and therefore in itself certain, is subsequently ascertained.³ Instances in which property sold, the extent and value of which are uncertain, is described in general terms, and those in which the owner of property sells such unascertained interest in it as he has, and the purchaser's expectations are

plainant should have the option of purchasing the property at any time before the expiration of the lease. It appeared that when the lease was made, gold and silver were the standard of values, but that subsequently notes of the United States were made by act of Congress a legal tender for private debts; that such notes had become greatly depreciated, and the value of the property very much enhanced, and that the complainant offered in payment legal tender notes, which were refused by the defendant, and payment in coin demanded. It was held that as at the time the proposition to sell embodied in the covenant of the lease was made, a substitution of notes for coin could not have been contemplated by the parties, and it was not reasonable to suppose that if it had been, the covenant would have been inserted in the lease without some provision against the substitution, the complainant was only entitled to a decree upon payment of the stipulated price in gold and silver.

¹ *Marble Co. v. Ripley*, 10 Wall, 330, per Strong, J.

² *Stone v. Pratt*, 25 Ill., 25.

³ *Stapilton v. Stapilton*, 1 Atk., 2; *Heap v. Tonge*, 9 Hare, 90. The following decisions concerning contracts depending upon future events wholly contingent and equally doubtful and uncertain to both parties, cited by Mr. Fry, *Specif. Perform.*, 107, 108, very well illustrate the above proposition. In *Parker v. Palmer*, 1 Cas. in Ch., 42, decided in the 14th year of Chas. II., it appeared that Parker, during the commonwealth, had sold a lease which he had from a dean and chapter for three lives to Palmer, for four thousand three hundred and twenty pounds, and that Palmer afterward agreed that if Parker would throw off four hundred and twenty pounds, he would reconvey the lease whenever the king, dean, and chapter were restored, and that the abatement was made. The king and church having been restored, this suit was brought by the vendor for a reconveyance, which was decreed accordingly. So, an agreement to sell for twenty pounds an allotment thereafter to be made to the vendor under an enclosure, was specifically enforced, although the allotment turned out to be worth two hundred pounds. *Anon.*, cited in *Cooth v. Jackson*, 6 Ves., 24.

disappointed, fall within this principle.¹ Where a member of a firm entered into a contract without fraud or concealment with the retiring partner to pay him two thousand pounds for his share in the concern, the agreement was upheld, though the parties both knew that the firm was insolvent. "Suppose," said the court, "the case of a trade attended with great risk, the partner despairing, the other partner confident and willing to buy the share of his partner, and to give him two thousand pounds for it; on what possible ground could the contract be invalidated?"²

§ 167. *Knowledge of party giving him an unfair advantage.*—But to render a contract capable of being specifically enforced notwithstanding its uncertainty at the time it was entered into, the events which are afterward made certain must have been doubtful and unknown to both parties. If one of them had knowledge of such events, he possessed an unfair advantage, and the contract will not be enforced against the other who was ignorant of them, though the terms of the agreement were such as to put him on his guard. A vendor made no representations as to the value of property sold, which was described as the interest, if any, of A. B. in certain stock and also in a lease on which there was a lien of one hundred pounds; and it was agreed that even if it should turn out that A. B. had no interest in the premises, the purchaser should have no remedy against the vendor to compel him to refund. The purchase money, amounting to one hundred and fifty pounds, having been paid, it appeared that in consequence of the state of certain partnership accounts which was known to the vendor, but which the purchaser had no means of ascertaining, the interest sold was of no value, and that the sale was in fact had in order to enable certain proceedings to be taken against the separate estate of A. B. On a bill filed by the purchaser against the vendor, the sale was set aside with costs.³ A

¹ See *Baxendale v. Seale*, 19 Beav., 601.

² *Peake ex parte*, 1 Mad., 346. See *Haywood v. Cope*, 4 Jur. N. S., 227.

³ *Smith v. Harrison*, 26 L. J. Ch., 412.

contract for sale will not, as a matter of course, be enforced, though it expressed an uncertainty as to the nature and extent of the subject matter, if the latter is subsequently ascertained to be wholly different from anything understood or contemplated by the parties; since in such a case, the court would be asked to compel the conveyance of what neither party intended to sell or buy. Thus, in a contract between A. and B. for the sale of a manor, it was provided that the vendor should not be obliged to define its boundary. It was afterward ascertained that the manor comprised a valuable property not before known to either party to belong to it. A bill for specific performance filed by the purchaser, who had previously sought to repudiate the contract, was dismissed, but without costs.¹

¹ Baxendale v. Seale, 19 Beav., 601.

CHAPTER IV.

HARDSHIP OF CONTRACT.

- 168. Judged according to the circumstances under which it occurs.
- 169. Specific performance not decreed when it would operate with unreasonable hardship.
- 170. Mere hardship not a defence.
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- 177. Effect of a liability to forfeiture.
- 178. In case of contracts for the sale of reversionary interests.

§ 168. *Degree of required to be shown.*—Having treated in the preceding chapter of unfairness in contracts as a defence to suits for their specific performance, we now proceed to speak of hardship or oppression, which, although necessarily involving the element of unfairness, has a wider application, for the reason that hardship may be either in the agreement itself, or arise from circumstances exterior and subsequent to it. Where the hardship appears from the very terms of the contract, a greater degree of hardship must be established to constitute a defence than when the oppressiveness flows from something collateral to the contract, and, so far, concealed and latent; since, in the former case, the parties will be presumed to have contemplated all the consequences of their agreement; while in the latter no such presumption arises.

§ 169. *Under what circumstances a defence.*—A defendant will in general succeed in procuring the dismissal of a suit for specific performance if he can convince the court that the exercise of its jurisdiction in granting the plain-

tiff's prayer for relief would operate with unreasonable hardship upon him under the circumstances of the case ;¹ it being one of the established principles of courts of equity not to entertain a bill for the specific performance of any agreement when it is doubtful whether the court may not thereby become the instrument of injustice, or deprive a person of rights which he is fairly entitled to have protected ;² as, where a contract for service, by which a young man put himself in the power of traders, by whom he was employed as a traveler and clerk, was so drawn, that if, from illness or any other cause over which he could have no control, he might become incapable of serving his employers, they had the option either to discharge him, or discontinue the payment of his salary and insist that during the balance of the time for which he was hired he should not engage in the service of any other person. " Nothing," it was remarked, " could be more harsh toward a young

¹ Gould v. Kemp, 2 My. & K., 308 ; Hylton v. Briscoe, 2 Ves. Sen., 304 ; Wood v. Griffith, 1 Swanst., 54 ; Kimberley v. Jennings, 6 Sim., 340 ; Talbot v. Ford, 13 Ib., 173 ; Seymour v. Delancy, 3 Cowen, 485 ; Cannaday v. Shepard, 2 Jones Eq., 224 ; Barrett v. Spratt, 4 Ired. Eq., 171 ; Huntington v. Rogers, 9 Ohio St., 511 ; Reed v. Rudman, 5 Ind., 409 ; King v. Hamilton, 4 Pet., 311 ; Eastman v. Plumer, 46 N. H., 464 ; Chambers v. Livermore, 15 Mich., 381 ; Society, etc., v. Butler, 12 N. J. Eq., 498 ; Margraf v. Muir, 57 N. Y., 155. But where a contract has been executed by the parties, equity will not declare it void on the sole ground that it is unconscionable, except in the case of an heir-expectant. Davidson v. Little, 22 Pa. St., 245.

² Tobey v. County of Bristol, 3 Story, 800 ; Andrews v. Andrews, 28 Ala., 432 ; Thompson v. Tod, Pet. C. C., 380 ; Gould v. Womack, 2 Ala., 83 ; Ellis v. Burden, 1 Ala. Sel. Cas., 458 ; Lucas v. Burnett, 1 Greene, Iowa, 510 ; Griffith v. Frederick County Bank, 6 Gill & Johns., 424 ; Waters v. Howard, 1 Md. Ch., 112 ; Smith v. Crandall, 20 Md., 482 ; Daniel v. Fraser, 40 Miss., 507 ; Rodman v. Zilley, 1 N. J. Eq., 320 ; Stoutenburgh v. Tompkins, 9 N. J. Eq., 332 ; McWhorter v. McMahan, 1 Clarke, N. Y., 400 ; Leigh v. Crump, 1 Ired. Eq., 299 ; Farr v. Glading, 1 Phila., 372 ; Hall v. Ross, 3 Hayw., 200 ; Rice v. Rawlings, Meigs, 496 ; Eastland v. Vanarsdel, 3 Bibb., 274 ; Wingate v. Fry, Wright, 105 ; McCarty v. Kyle, 4 Coldw. Tenn., 348 ; Smith v. Wood, 12 Wis., 382. In order to induce a court of equity to enforce specifically a contract, " the complainant must show no oppression or unconscionable advantage when he comes into a court of conscience asking for a remedy beyond the letter of his strict rights. He must not ask for a favor beyond his technical legal rights when he bases his claim to that favor upon a hard, oppressive, technical advantage. He must stand before the court prepared to meet its scrutiny without a blush, relying upon the advocacy of a well-regulated conscience in his favor. Such must not only be his own position, but he must show that it is not unjust or oppressive to the defendant to compel him to perform specifically." Caton, C. J., in Stone v. Pratt, 25 Ill., 25.

man dealing with great traders than that he should be allowed to enter into an agreement which placed him so entirely in their power. . . . It is a hard bargain, and therefore this court will not interfere.”¹ It appearing that a contract between two railroad companies if carried out would divert from its legitimate channel a large portion of the profits of one, part of the line of one company for the benefit of the other without any corresponding advantage, specific performance was refused irrespective of the consideration whether or not such contract was legally binding. Where trustees agreed in a contract for sale to pay off incumbrances, and it was ascertained to be doubtful whether the purchase money would be sufficient for that purpose, the court refused to compel the trustees personally to exonerate the estate and to complete the sale.² Where a mortgagor agreed to grant a lease under the expectation of obtaining the mortgagee’s consent, which he failed to do and was unable to redeem, specific performance was refused at the suit of the proposed lessee, though the court granted the alternative prayer of the bill for rescission.³ The court declined to enforce a contract of sale where the value of adjoining land would thereby be greatly depreciated.⁴ So, specific performance was refused of an agreement to purchase land without a right of way to it.⁵ It was held that specific performance would not be decreed of a contract to convey real estate where notes were given for the purchase money payable in Confederate treasury notes, which, before the maturity of the notes, became worthless; and that it was not sufficient for the plaintiff to allege that he was ready and willing to comply with his

¹ *Kimberley v. Jennings*, 6 Sim., 340, per Sir L. Shadwell; overruled on another point in *Lumley v. Wagner*, 1 De G. M. & G., 604.

² *Shrewsbury & Birmingham R.R. Co. v. London & Northwestern R.R. Co.*, 4 De G. M. & G., 115; S. C. 6 House of Lds., 113.

³ *Wedgwood v. Adams*, 6 Beav., 600.

⁴ *Costigan v. Hastler*, 2 Sch. & Lef., 160.

⁵ *Church of the Advent v. Farrow*, 7 Rich. Eq., 378.

⁶ *Denne v. Light*, 3 Jur. N. S., 627.

contract, and offered "to do whatever this court may order to be done in the premises respecting said Confederate money."¹ And where a person sells property which is subject to stringent covenants in relation to the use of it, the court will decree that the purchaser, whether he knew of the covenants or not, may elect to rescind the contract, or to take a conveyance with similar covenants.² When a sale is made under a decree of the court, the purchaser will not be compelled to complete the purchase, if it would be unjust in a private individual to insist upon performance.³

§ 170. *Not enough that plaintiff has the advantage.*—Although a court of equity will not weigh nicely the relative advantages or disadvantages of a bargain fairly made, yet it will always consider whether, either from gross inadequacy of consideration, or inequality of terms such as shock the common sense of justice, or from anything in the relations of the parties, or in the circumstances of the contract, it is unconscionable in a party to exact his advantage.⁴ But the mere naked hardness of a bargain is

¹ Daughdrill v. Edwards, 59 Ala., 424.

² Moxhay v. Inderwick, 1 De G. & S., 708; Lukey v. Higgs, 24 L. J. Ch., 495. A., a mortgagee with power of sale, having obtained a decree of foreclosure, intending to sell as absolute owner, entered into a contract for sale to B. In the contract there was inadvertently copied from conditions of sale or other parts of the property previously drawn up, the statement that A. was a mortgagee with power of sale. He offered to convey as owner under the decree of foreclosure, but B. insisted on a title under the power of sale. In a suit brought by the latter for specific performance of the contract, the court, considering that to impose on the vendor the risk of opening the decree of foreclosure in such a sale would be a hardship, ordered that the bill be dismissed unless the plaintiff accepted the conveyance which the defendant was ready to execute. Watson v. Marston, 4 De G. M. & G., 230. Where a lessee of mines entered into a covenant with the lessor, that if the latter at any time before the end of the term should notify the former of his wish to take the machinery about the mines, the lessee would at the expiration of the lease deliver the articles named in the notice to the lessor on his paying the value, to be ascertained by valuation, specific performance of the covenant was refused on the ground of hardship, and the court also declined to interfere by injunction. Talbot v. Ford, 13 Sim., 173. A. having agreed, in consideration that B. would not join in barring an entail, to convey to him, his heirs or assigns, the fee of such parts of the estates which were situated in three counties as he or they should choose, to the yearly value of two hundred pounds, specific performance was refused on the ground among other reasons of the inconvenience and hardship to which A. would thereby be subjected. Hamilton v. Grant, 3 Dow., 33, 47.

³ Laight v. Pell, 1 Edw. Ch., 577.

⁴ "As it is impossible to reduce within the limits of a legal definition or rule

not a valid objection to the enforcement of a contract in equity when the contract is otherwise attended with circumstances which make its specific performance equitable.¹ Thus, where a father conveyed his entire estate to his children on their agreeing to support and maintain their parents in a way suitable to their condition wherever they might desire to reside, the court decreed a specific performance, though the property conveyed was wholly inadequate to such support.² In an action of ejectment, to compel the specific performance of a contract of sale, it appeared that the defendant agreed that the plaintiff might dig five shafts on the defendant's lot in search of iron ore between the date of the agreement and the first of April following, and that if then the plaintiff wished to purchase the lot for one thousand dollars he should have the right to do so; two hundred dollars of the purchase money to be paid upon the execution of the deed, and eight hundred dollars in two years thereafter, with interest, to be secured by a mortgage on the premises, and that iron ore was found by the plaintiff in the fifth and last shaft. The defendant offered to prove that, by the ordinary process of mining ore, the land would be so dug up within the two years as to be worthless, and to show the amount of unsatisfied mortgages

the various transactions which may render a contract inequitable, the court must deal with each case upon its own circumstances. Herein appear the nature and limits of the discretion assumed by the court for this branch of its jurisdiction, and also in what sense it is, that a specific performance is said to be not a matter of course. The relief lies in the discretion of the court only so far as it must necessarily judge whether under the circumstances of the case the contract is or is not an inequitable one. That being determined, judicial discretion ceases." *Godwin v. Collins*, 4 Houst. (Del.), 28, per Bates, Ch. And see *King v. Hamilton*, 4 Pet., 310; *Lee v. Kirby*, 104 Mass., 420; *Wedgwood v. Adams*, *supra*.

¹ *Morrison v. Pray*, 21 Ark., 110. In *Coke v. Bishop*, 3 Swanst., 401, the defendant had entered into articles with the plaintiff to settle upon him all his real and personal estate which he had or might thereafter have except three thousand pounds. A decree was made to settle all he then had. Lord Nottingham said: "An attempt was made before me to have a new decree against the defendant to settle new acquisitions made by him, but I did not think that a court of conscience obliged to execute such a strange agreement any further than it had been carried already, since it tended to the discouragement of all honest industry."

² *Chubb v. Peckham*, 13 N. J. Eq., 207.

and judgments against the plaintiff. There being no proof of fraud, unfairness, weakness of intellect, intoxication, surprise, or any circumstance affecting the capacity of the defendant, it was held on appeal that the evidence was properly rejected.¹

§ 171. *Cannot be set up by members of corporation.*—Where a contract is entered into by a corporation, its hardship to individual members will not constitute a defence; for the court “cannot recognize any party interested in the corporation, but must look to the rights and liabilities of the corporation itself.”²

§ 172. *With reference to construction of contract.*—We have seen³ that if the hardship flows from the very terms of the contract, and must therefore have been present to the minds of the parties when they made the agreement, it will require a much stronger case to induce the court to withhold its interference than when the hardship arises from something extrinsic, and so far concealed as to have been likely to escape attention. Where the question is as to the construction of a contract, and its hardship is insisted upon as an argument to show that a particular construction cannot be correct, “unless hardship arises to a degree of inconvenience and absurdity so great that the court can judicially say such could not be the meaning of the parties, it cannot influence the decision.”⁴

§ 173. *Must have existed at date of contract.*—It is not only just in itself, but essential to the maintenance of business relations between the parties, that an agreement, fairly entered into between them upon a sufficient consideration in view of the then existing state of things, should not be

¹ Corson v. Mulvany, 49 Pa. St., 88.

² Edwards v. Grand Junction R.R. Co., 1 My. & Cr., 674; Hawkes v. Eastern Counties R.R. Co., 1 De G. M. & G., 737, 754.

³ *Ante*, § 168.

⁴ Preble v. Boghurst, 1 Swanst., 309, per Lord Eldon, in speaking of the hardship which the defendants alleged would result from the carrying out of an agreement under which the issue of a first marriage claimed the whole of the real estate of their father to the exclusion of the issue of the second marriage.

evaded in consequence of subsequent events rendering it less advantageous to one of the contractors than he had expected. The question of hardship, therefore, should, as a general rule, be judged of in respect to the time of the contract.¹ Certainly, if the contract was reasonable when it was entered into, it will be no defence that, owing to a change of circumstances, it has become, without the fault of the party seeking its performance, less beneficial to the other, the parties to the agreement being held to have assumed whatever contingencies may attach to it.² A lessee of renewable leaseholds having covenanted with his sub-lessee for renewal without fine on every renewal to himself, afterward, contrary to his expectations, a renewal was made to him on terms much less beneficial than had previously been done, but he was nevertheless compelled to renew to his sub-lessee without any contribution toward the increased fine he had paid.³ Where the vendee of a farm objected that after the making of the contract and before conveyance, streets were so laid out as to make the shape of the lots into which he meant to divide the farm in some places less desirable than they would have been if the streets had run where the plaintiff induced him to believe they would, and neither warranty nor misrepresentation on the subject was shown, it was held no ground for refusal to fulfil the contract, or for compensation.⁴ Specific performance of a contract to release a portion of land mortgaged from the mortgage lien will not be refused on account of unexpected hardship, the land having dimin-

¹ *Low v. Treadwell*, 12 Me., 441; *Eames v. Eames*, 16 Mich., 348; *Lee v. Kirby*, 104 Mass., 420. Where a contract was fully understood by the parties at the time of its inception, and is not vitiated by illegality or fraud, a court of equity will not rescind it, although subsequent events may have so materially changed its operation as to make it hard and oppressive on one of the parties. *Addington v. McDonnell*, 63 N. C., 389; *ante*, § 165. But see *post*, § 176.

² *Lawder v. Blachford*, Beat., 522; *Webb v. Direct London & Portsmouth R.R. Co.*, 9 Hare, 129. It is the same at law. *Jones v. Lees*, 26 L. J. Ex., 9.

³ *Evans v. Walshe*, 2 Sch. & Lef., 419. And see *Revell v. Hussey*, 2 Ball & B., 280; *Haywood v. Cope*, 4 Jur. N. S., 227.

⁴ *Morgan v. Scott*, 26 Pa. St., 51.

ished in value while the debt increased.¹ And the same was held where a person agreed to pay a very high price for land on which he intended to erect a mill, which he could not do without the consent of a corporation, which was refused.²

§ 174. *Caused by the defendant.*—When the hardship has been occasioned by the defendant, and what he has agreed to do is “reasonably possible,” he cannot avail himself of hardship as a defence against the specific performance of the contract;³ as where a contract having been entered into by a railroad company for the purchase of land, the powers of the company through its own laches expire before the completion of the purchase.⁴ Where a tenant for life agreed to grant a mining lease, and, to a bill for specific performance by the proposed lessee, he set up that as he was only a tenant for life he had no power to grant such a lease, and would be accountable for waste, it was held that he must carry out the contract so far as he was able.⁵ Although an agreement contained in a submission to arbitration which is unreasonable, will not be enforced;⁶ yet it is otherwise, where the hardship is in the award itself, unreasonableness in the latter, being in a matter subsequent,

¹ *Nims v. Vaughn*, 40 Mich., 356.

² *Adams v. Weare*, 1 Bro. C. C., 567. In this case Lord Thurlow said: “I am not very anxious to discuss the point what bargains the court will execute or not. But when the court has laid it down as an article of the equity which men shall obtain here and which they cannot obtain at law, that instead of damages they shall have a specific performance, and that every agreement must be performed unless something at the time of making the bargain, or something done since, is to amount to a waiver of it at the time of carrying it into execution, if you do not confine yourself within that limit there are no bounds whatsoever. For rules ought to be fixed, and it would be calamitous that the matter should rest upon such loose expressions as hard and unconscionable, which expressions, unless they are properly applied, mean little or nothing. . . . I think that, without entering into the particulars of the case, the master of the rolls has done right. For no case can be cited where parties have made a bargain with their eyes open, and no surprise whatever, as in this case, in which the court has refused to decree a specific performance.” See Lord James Stuart v. *Northwestern R.R. Co.*, 15 Beav., 523.

³ *Pembroke v. Thorpe*, 3 Swanst., note, 443; *Storer v. Gt. Western R.R. Co.*, 2 Y. & C. C. C., 52; *post*, § 199.

⁴ *Hawkes v. Eastern Counties R.R. Co.*, 1 De G. M. & G., 737, 755; S. C., 5 House of Lds., 331.

⁵ *Cleaton v. Gower*, Finch, 164. ⁶ *Nickles v. Hancock*, 7 De G. M. & G., 300.

and arising from the decision of an arbitrator whom the parties themselves have chosen, and the risks attending upon whose judgment they have assumed.¹

§ 175. *In case strict fulfilment required.*—Where the contract has been substantially carried out, and, owing to what has been done under it, its literal performance will be peculiarly hard to the defendant, it will not be specifically enforced, nor will the court enforce the performance of speculative engagements.² Thus, a person having contracted to build several houses, built only two new ones, and put the others in good condition by repairing them, and in so doing expended twenty-two hundred pounds, it was held that although the agreement was capable of being enforced, yet as it would entail great loss and hardship on the defendant, and be useless to the plaintiff, the court would not interfere.³ Where the plaintiff sold and conveyed to a railroad company a strip of land six rods in width across a small village lot on which there was no building, without reserving the right of a passage-way over the portion conveyed, and the company constructed an embankment thereon for the track of their road fifteen feet high, and no special circumstances with regard to the manner in which the land had been or might be used rendering a crossing necessary were shown, and it was manifest that the cost of a suitable crossing would greatly exceed its value to the plaintiff, it was held that specific performance of the duty imposed upon the company by statute to construct a crossing would not be decreed, but that the plaintiff must be left to his remedy at law.⁴

¹ Wood v. Griffith, 1 Swanst., 43; Fry on Specif. Perform., 117.

² Perkins v. Wright, 3 Har. & McHen., 324. "The court ought not to decree performance according to the letter, when from change of circumstances, mistake, or misapprehension, it would be unconscientious so to do. The court may so modify the agreement as to do justice as far as circumstances will permit, and refuse specific execution unless the party seeking it will comply with such modification as justice requires." Thompson, J., in Mechanics' Bank of Alexandria v. Lynn, 1 Peters, 376.

³ City of London v. Nash, 3 Atk., 512; S. C., 1 Ves. Sen., 12, per Lord Hardwicke.

⁴ Clarke v. Rochester, Lockport & Niagara Falls R.R. Co., 18 Barb., 350.

§ 176. *Occasioned by plaintiff.*—A contract which becomes unreasonable after it is made, through the fault of the plaintiff, will not be enforced.¹ Lapse of time, change of circumstances, backwardness and trifling on the part of the vendee of land, may induce a court of equity to refuse to decree specific performance in his behalf.² He must present his claim to relief while affairs remain in such a condition that performance can be enforced without injury to others, and especially he must not himself have done any act that is incompatible with his claim for performance, or that makes such a claim inequitable.³ In a suit for the specific performance of a contract for the sale of land, and for an injunction restraining the defendant from prosecuting an action of ejectment for such land, it appeared that the defendant, as trustee, sold the land at public auction in January, 1863, for Confederate money payable in cash; that the complainant, who was the sole bidder, was declared the purchaser; that the complainant did not pay the cash at the sale, but offered to do so ten or twelve months thereafter, when Confederate money had greatly depreciated; that the price bid for the land was less than one-fourth of its value; and that Confederate money at the commencement of the suit was utterly worthless: it was held that as the complainant did not fulfil on her part, and the enforcement of the contract, if it were practicable, would be unjust and inequitable to the defendant and the trust creditors whom he represented, the relief asked must be refused.⁴ A., being in occupation of a residence, conveyed to B. adjoining land for the erection thereon by B. of a mansion, with gardens and offices; B. covenanting with A. not to use the land in a particular manner which would interfere with the enjoyment by A. of certain other adjoining lands. A., or those claiming under him, subsequently covered a considerable

¹ Garnett v. Macon, 6 Call, 308; Ford v. Herron, 4 Munf., 316.

² Turner v. Clay, 3 Bibb., 52; Patterson v. Martz, 8 Watts, 374; *post*, § 471.

³ Potter v. Dougherty, 25 Pa. St., 405. ⁴ Whitaker v. Bond, 63 N. C., 290.

part of these lands with houses, and the residence of A. was torn down to make way for streets and buildings. On a motion for an injunction to restrain the defendants, who claimed under B., from using the land in breach of the covenants of the deed, it was held that as A. had changed the condition of the property, it would be inequitable thus to enforce the covenants specifically, and the plaintiff was left to his remedy at law.¹ So, where a mode of renewal different from that pointed out by the covenant, had been acquiesced in for a long time, the court refused to enforce the covenant in its original terms.²

§ 177. *Where performance would cause forfeiture.*—The liability to a forfeiture will be deemed such a hardship as to prevent the court from enforcing the contract against the person thus liable.³ Where a testator devised a

¹ Duke of Bedford v. The Trustees of the British Museum, 2 My. & K., 552. See Shrewsbury & Birmingham R.R. Co. v. Stour Valley R.R. Co., 2 De G. M. & G., 882.

² Davis v. Hone, 2 Sch. & Lef., 341.

³ Fildes v. Hooker, 3 Mad., 106. In September, 1852, A. entered into a contract with B. to sell him several parcels of land for four thousand and fifty dollars. A year afterward, A. agreed that certain covenants with C. should be performed on the 10th of the following October, and that if he failed to do so, he would forfeit and pay one thousand dollars as stipulated damages, to secure which, he deposited with D. & E. the obligation of B. to pay him the purchase money; and D. & E. were authorized to deliver said obligation to C. in case A. failed to pay the thousand dollars. And C. was authorized to sell the contract of B. in open market, in order to raise the money with which to pay himself the thousand dollars. Before the time fixed for performance by A. of his covenants with C., A. alleging that he had been defrauded by C., forbade D. & E. to deliver to C. the obligation of B. In January, 1853, one S. purchased of B. fifteen acres, part of the premises which A. had sold and agreed to convey to B. D. & E. delivered the obligation of B., which A. had left with them, as above stated, to C., who, in January, 1854, sold it to S. for one thousand dollars, which was just sufficient to pay the forfeiture provided for in the contract between A. and C. S. insisting that by the purchase of the obligation, he was entitled to recover the money due thereon in place of A., and that the latter was in effect thereby fully paid the purchase money for which he had agreed to convey the premises sold to B., filed a bill in equity to compel A. to convey to him the fifteen acres which he had purchased of B. The court in affirming the decree of the court below dismissing the bill, said in substance as follows: "It is a well-settled rule of law, that an entire contract cannot be divided so as to compel a party to perform it in parcels, either to different persons, or at different times. When B. sold a part of the premises to S. he could not thereby impose the legal obligation upon A. to convey that portion to S. and the balance to himself. That would be making it in fact two contracts instead of one. It was asking him to make satisfaction to two instead of to one. In case of disagreement, it exposed him to two prosecutions instead of one, and required him to make two deeds instead of one. This

small estate to his son on condition that if he sold it within twenty-five years, half of the purchase money should go to his brother, specific performance of a contract entered into by the son for the sale of the property was refused.¹ And where a lessee contracted for the sale of building lots, and agreed to make a road which it was ascertained he could not do without being liable to the forfeiture of leasehold land through which the road would pass, or of being sued by the lessor, specific performance was decreed excepting as to the construction of the road, with compensation to the purchaser for the want of that.² Specific performance of a contract to purchase leaseholds was refused where it would involve the purchaser in litigation as to the payment of ground rents the title to which was disputed.³ When the liability to forfeiture is incurred by a transaction of the party subsequent to the contract, specific performance will, notwithstanding, be decreed against him.⁴

is a hardship which the common law will never allow to be imposed upon a promissor or obligor. Nor is this principle of the common law ignored by courts of equity, although in exceptional cases they will overlook it, where it is necessary to protect the rights of an innocent, fair, and *bona fide* purchaser against a contemplated fraud. Waiving the question of the division of the contract, the complainant, before he could call on the defendant to convey to him this land, was obliged to satisfy an obligation which secured to the defendant about four thousand dollars. He attempts to do this not by paying him, or any one else having a right to receive the money, the actual amount due or to become due on the contract; but he purchases the contract at a forced sale, for one thousand dollars. The defendant, by his contract with B., was entitled to receive about the sum of four thousand dollars, before he could be asked, even by B. himself, to convey any portion of the premises. Now, what has he realized for this four thousand dollars worth of land? Absolutely nothing. His claim or right to receive the money was sold (and upon the validity of that sale we pass no opinion) to pay a forfeit. Nothing more; nothing for which he had received value. Now all of this may have been a strictly legal transaction. The defendant, by his own folly, may have frittered away his legal right to this money, or to the land; but it is not such a transaction as should induce a court of equity to throw down the legal barriers which surround the defendant, and compel him to do more for the ease and benefit of the complainant than the strict rules of law will give him. Equity will never give the pound of flesh, although it is in the bond; but will leave the law to give its value only." *Stone v. Pratt*, 25 Ill., 25.

¹ *Faine v. Brown*, cited 2 Ves. Sen., 307. ² *Peacock v. Penson*, 11 Beav., 355.

³ *Pegler v. White*, 33 Beav., 403.

⁴ *Helling v. Lumley*, 3 De G. & J., 493. In England it has been held that where the vendor of land is liable to covenants in relation thereto, although there is no stipulation that he shall be indemnified against them, yet the purchaser, after notice of the covenants, must elect either to rescind the contract, or to execute an

§ 178. *Where reversionary interests are sold.*—To the head of hardship, may be referred contracts for the sale of reversionary interests. As one who is possessed of only a future interest sells at a disadvantage, contracts of heirs for the sale of such estates at an under-value will not be enforced; and the burthen of showing that the transaction was in all respects fair, will rest on the purchaser who seeks the aid of the court.¹ This principle is not applicable when the tenant for life and the reversioner concur, for the reason that they together constitute “a vendor with a present interest.”² But it is otherwise in case of the sale of an inconsiderable interest in possession, together with the reversion:³ as, for instance, the sale of an annuity in possession with the reversion when the estimated value of the annuity is only about one-sixth of the reversion.⁴ The principle under consideration does not apply where the reversionary interest has been sold at auction, for the reason that as there is in such case no treaty between the vendor and vendee, the former is in no sense in the power of the

indemnity to the vendor; since if this were not done, the vendor would lose his land, and retain his liability as to it. *Moxhay v. Inderwick*, 1 De G. & Sm., 708; *Lukey v. Higgs*, 24 L. J. Ch., 495.

¹ *Playford v. Playford*, 4 Hare, 546. In relation to the specific performance of contracts for the sale of expectancies, see *ante*, B. 1, Ch. 2, §§ 37, 38, 39.

² *Wood v. Abrey*, 3 Mad., 417. “It was laid down by Lord Brougham, Chancellor, in *King v. Hamlet*, 2 M. & K., 456, that the extraordinary protection given the sale of reversionary interests, must be withdrawn if it shall appear that the transaction was known to the father, or other person standing in *loco parentis*, the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession, even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him. Sir Edward Sugden, V. & P., 316, states that this rule is supported by no previous authority, and as a general rule, cannot be maintained. But Lord Brougham’s decision was affirmed by the House of Lords, and Lord Lyndhurst there stated his concurrence in the chancellor’s judgment. And it is submitted that the rule is correct as to the contracts by persons respecting expectancies from a party who was aware of the contract; because the concealment of such a contract from that party is made in the early cases the chief ground of objection to such transactions; the policy of the law being against a dealing as to expectations which is kept a secret from those by whose bounty the expectations are to be realized.” *Batten on Specif. Perform.*, 30, referring to *Cock v. Richards*, 10 Ves., 429; *Woodhouse v. Shepley*, 2 Atk., 535.

³ *Davis v. Duke of Marlborough*, 2 Swanst., 154.

⁴ *Earl of Portmore v. Taylor*, 4 Sim., 182.

latter, and there is no opportunity for fraud or imposition on the part of the purchaser.¹ Moreover, the court decides the question of under-value by the market price, which a sale at auction is a mode of ascertaining.² Circumstances which would induce the court to rescind the sale of a reversionary interest if completed, will afford a defence to a suit for the specific performance of an executory contract for its sale.

¹ *Shelly v. Nash*, 3 Mad., 232.

² *Wardle v. Carter*, 7 Sim., 490; *Barell v. Dann*, 2 Hare, 452; *Earl of Aldborough v. Trye*, 7 Cl. & Fin., 436, 460; *Edwards v. Burt*, 2 De G. M. & G., 55.

CHAPTER V.

INADEQUACY, ABSENCE, OR FAILURE OF CONSIDERATION.

- 179. Mere inadequacy of consideration not a defence.
- 180. Inadequacy material in connection with other circumstances.
- 181. Distinction between inadequacy and excess of price.
- 182. What necessary to be shown where inadequacy is relied on as a defence.
- 183. Excess of price when a ground for refusing specific performance.
- 184. Inadequacy in case of sale at auction.
- 185. Inadequacy to be determined with reference to time of agreement.
- 186. Voluntary contracts not enforced.
- 187. Rule as to gifts of real estate.
- 188. What deemed a sufficient consideration.
- 189. Failure of consideration when a defence.
- 190. Subject matter of contract must exist at date of agreement.
- 191. At what time contract becomes complete in case of sale by court.
- 192. Rule where benefit or loss results after signing of contract.
- 193. Loss by whom borne when contract is conditional.
- 194. After conclusion of contract, property at risk of purchaser.
- 195. Rule where contract has become incapable of being performed since commencement of suit.

§ 179. *Inadequacy not in itself an objection.*—Although inadequacy of consideration in contracts for sale, either in the price or property sold, may be a ground of defence, yet the facility of contracting and the free exercise of the judgment and will of the parties require that, as a general rule, they should be sole judges as to the value of the benefits to be derived from their bargains. It is therefore manifestly just and expedient that mere inadequacy of consideration or value should not in itself be deemed by the court a sufficient reason to refuse to specifically enforce a contract, or a cause to set it aside. And such is now the rule.¹ “For courts of equity, as well as courts of law, act

¹ Stilwell v. Wilkins, Jac., 282; Haywood v. Cope, 25 Beav., 140; White v. Flora, 2 Overton Tenn., 426; Newman v. Meek, 1 Freem. Miss. Ch., 141; Wintermute v. Snyder, 2 Green Ch., 489; Eyre v. Potter, 15 How., 42; Ayers v. Baumgarten, 15 Ill., 444; Harris v. Tyson, 24 Pa. St., 347; Kidder v. Chamberlin, 41 Vt., 62; Judge v. Wilkins, 19 Ala., 765; Chaires v. Brady, 10 Fla., 133; Maddox v. Simmons, 31 Ga., 512; Holmes v. Fresh, 9 Mo., 201; Harrison v. Town, 17 Ib., 237; Shepherd v. Bevin, 9 Gill, 32; Potter v. Everett, 7 Ired. Eq.,

upon the ground that every person who is not from his peculiar condition and circumstances under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable, or otherwise, are considerations not for courts of justice, but for the party himself to deliberate upon."¹ The reason of this is to be sought in the extreme difficulty of judging as to the feelings and motives which may have actuated the parties, and the corresponding variety of opinions which may be formed with reference to the sufficiency of the consideration. A different view of the subject was formerly entertained. Thus it was held in an early case that, independently of all considerations of fraud, the court upon the mere circumstance of hardship in the transaction would not enforce it.² Where there was a contract for the sale of property worth ten thousand pounds for twenty thousand pounds, six thousand pounds to be paid down, and the balance on the death of a man aged sixty-four or sixty-five,

152; *Mann v. Betterley*, 21 Vt., 326; *Stearns v. Beckham*, 31 Gratt., 379. The general rule is that inadequacy of consideration, exorbitance of price, or improvidence in the contract, in the absence of fraud, ambiguity, or mistake, will not constitute a defence. *Lee v. Kirby*, 104 Mass., 420; *Booten v. Scheffer*, 21 Gratt., 474.

¹ 1 Story's Eq. Juris., Sec. 244. "The value of a thing is what it will produce, and admits of no precise standard. It must be in its nature fluctuating, and will depend upon ten thousand different circumstances. One man, in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances which may induce him to sell it at a particular time. Now, if courts of equity were to unravel all these transactions, they would throw everything into confusion, and set afloat all the contracts of mankind. Therefore I never can agree that inadequacy of consideration is in itself a principle upon which a party may be relieved from a contract which he has wittingly and willingly entered into. It may indeed be strong evidence of fraud, etc., when you see distress on one side and money on the other, and a wish on the one side to press that distress into submission to its terms. Inadequacy of price goes a great way in warranting the court to infer from this that some sort of fraud was used to draw the other party into the bargain." Lord Ch. B. Eyre in *Griffith v. Spratley*, 1 Cox, 384. A court will not annul dispositions of property on the sole ground that they are improvident, or such as a wise man would not have made, or a man of nice honor consented to receive; but all the bargains of a person, if formally executed, and no power of revocation reserved, are binding, unless avoided by reason of surprise, mistake, duress, undue influence, the suggestion of falsehood, or the suppression of truth. *Green v. Thompson*, 2 Ired. Eq., 365.

² *Tilly v. Peers*, cited 10 Ves., 301.

and there were no circumstances of oppression or deceit, the court, while it refused to set aside the agreement, also refused to enforce it on the ground that it was a hard bargain.¹ And where a person, during a public mania for speculation, had purchased a house for ten thousand five hundred pounds, and paid a deposit of one thousand pounds, he was discharged on forfeiting the deposit on the ground of the general delusion the nation was under at the time of the contract, and the imaginary values then put by people on property.² Chancellor Kent held that inadequacy of price might of itself, and without fraud or other ingredient, be sufficient to prevent the court from enforcing the specific performance of a contract to sell land. In the case in which he so decided,³ the inadequacy was so great (one-half) as to give the character of hardship, unreasonableness, and inequality to the contract. This decision was, however, reversed on appeal.⁴

§ 180. *To be viewed with reference to particular transaction.*—But inadequacy of consideration is always a material circumstance, to be weighed along with other circumstances existing in a case, conducing to show that it would be inequitable to enforce the specific performance of the contract. Where A. purchased property of B. for a small sum compared with its value, agreeing to give the children of B. the benefit of it on being repaid the purchase money

Day v. Newman, 2 Cox, 77.

² Savile v. Savile, 1 P. Wms., 745; S. C., 5 Vin. Abr. 516, Pl. 25. And see Gasque v. Small, 2 Strobb. Eq., 72.

³ Seymour v. Delancey, 6 Johns. Ch., 222.

⁴ 3 Cowen 445. "By the Roman law these difficulties in the way of relieving against inadequacy of consideration in certain cases were overcome, at least as to immovable property, by the fixing of the arbitrary standard of half the real price as that which would give the sufferer a right to the interference of the law. When the price paid did not amount to half the real value of the thing sold, the vendor might put the purchaser to his election either to take back the purchase money and restore the thing sold, or to keep the thing and make up the deficiency in the purchase money. The French law adopted the same principle, except in the case of sales between co-heirs and co-proprietors, where a defect of one-quarter of the price had the same effect as the like defect of one-half in other cases." Fry on Specif. Perform., 131, referring to Code, Lib. IV., Tit. 44; Pothier Tr. des Oblig., P. 1, Ch. 1, S. 1, Art. 3.

and interest, the court held that the doctrine that equity will not enforce a contract where there is great inadequacy of price did not apply, and specific performance was decreed.¹ A., living in Canada, entered into an agreement with B. to remove with his family to the city of C., where B. resided, and live with and take care of B. during her life, she stipulating to give her residence to some one of A.'s family, after her death, by a deed left in escrow, or by will. A. performed his part of the contract, but B. died without deeding or devising the property as agreed. In a suit for specific performance, brought by A., his wife, and children, it being ascertained that the consideration was very inadequate, and that there were other inequitable circumstances, the relief asked for was refused, and the trial of an issue ordered to determine the amount of compensation to which A. was entitled for the services rendered, articles furnished, and money expended in performing the contract.² Where the inadequacy is such as to shock the moral sense of mankind, it constitutes a defence; though fraud is of the essence of the objection to the contract in such a case.³ Where the price for which land was sold was not one-tenth its value, it was held that although this might not constitute ground for a rescission if unconnected with fraud, yet it was a good reason why the court ought not to aid the purchaser.⁴ So, where land sold for twenty-one dollars, would readily have brought one hundred and five dollars, and was worth five hundred or six hundred dollars, and the purchasers were calculating speculators, it was held that they were not entitled to the aid of the court.⁵ With regard to circumstances

¹ *Sarter v. Gordon*, 2 Hill S. C. Ch., 121.

² *Stanton v. Miller*, 14 Hun., 383; S. C., 58 N. Y., 192.

³ *Coles v. Trecothick*, 9 Ves., 246; *Borell v. Dann*, 2 Hare, 440; *Osgood v. Franklin*, 2 Johns. Ch., 1; *Garnett v. Macon*, 2 Brock, 185; *Fripp v. Fripp*, Rice Ch., 84; *Hardeman v. Burge*, 10 Yerg., 202; *Juzan v. Toulmin*, 9 Ala., 662; *White v. Thompson*, 1 Dev. & Batt. Eq., 493; *Burtch v. Hogge*, Harr., Mich., 31; *Rodman v. Zillely*, 1 N. J. Eq., 320; *Viele v. Troy*, etc., R.R. Co., 2 Barb., 581; *Western R.R. Corp. v. Babcock*, 6 Metc., 346; *Hays v. Hollis*, 8 Gill, 357; *Hale v. Wilkinson*, 21 Gratt., 75.

⁴ *Clement v. Reid*, 9 Sm. & Marsh, 535.

⁵ *Modisett v. Johnson*, 2 Blackf., 431.

surrounding a contract of sale likely to affect the decision of the court, it was held, in one case, that the extreme old age of the contracting party, the suddenness with which the proposition to buy was presented to him, the brief period taken for consideration, his ignorance of the quantity of land which he was about to sell, coupled with very considerable proof of mental weakness, and great inadequacy of price, presented abundant reasons for withholding equitable aid to the consummation of the contract.¹ In another case, a decree for the specific performance of a contract for the sale of real estate, was denied on account of great inadequacy of price, although there was no proof of actual fraud or imposition on the part of the purchaser, the vendor having just attained the age of twenty-one, and having acted hastily upon being urged by the vendee.² Where the parties to the sale of a legacy were of very unequal capacity—the seller being a man of naturally weak intellect, rendered weaker by habits of intemperance of long standing, in embarrassed circumstances, and reposing confidence in the buyer, who was sharp and sagacious, and the contract was grossly inadequate—it was decreed, in a suit brought by the seller for relief, that the buyer should pay to him the difference between the amount named in the contract of sale, and what would constitute a fair price.³ Where, however, a young man who had just attained the age of twenty-one, sold his reversionary interest in land, and there was no fraud on the part of the purchaser, or confidential relation between the parties, it was held that the sale would not be set aside for mere inadequacy of price.⁴ So, where a man over sixty years of age, of intemperate habits, and in prison on a criminal charge, sold and conveyed to a person a farm

¹ *Graham v. Pancoast*, 30 Pa. St., 89.

² *Clitherall v. Ogilvie*, 1 Dessaus Eq., 250.

³ *McCormick v. Malin*, 5 Blackf., 509. And see *Campbell v. Spencer*, 2 Binney, 133; *Henderson v. Hays*, 2 Watts, 148. A deed given by a weak man in a necessitous condition, for a very inadequate consideration, will be set aside. *Bunch v. Hurst*, 3 Dessaus Eq., 273; *Butler v. Haskell*, 4 Ib., 651.

⁴ *Cribbins v. Markwood*, 13 Gratt., 495.

worth twenty-five hundred dollars, and renting for eighty dollars a year, in consideration that the vendee would become his bail, and pay him the annual sum of one hundred dollars during his life, and there was no proof of fraud in the transaction, it was held that there was not such inadequacy as to be a ground for setting aside the conveyance.¹

§ 181. *Distinction between too small and too great a price.*—Inadequacy of consideration in contracts for sale may be either in the purchase money or in the subject matter of the sale. In other cases of contract it may consist in the inequality of that to which the contract has reference.² The questions as to the inadequacy of the price set up by the vendor and as to its excess set up by the purchaser are very different. Inadequacy can be ascertained by comparison with the general market value of similar property. But the court has apparently no satisfactory means of pronouncing a price excessive, or, in other words, of determining what represents the money value of property to an individual; there being no standard by which such value can be fixed. The fact that the purchaser entered into the contract voluntarily and with full knowledge, may not unreasonably be regarded as determining the real value of the property to him at the time of the agreement, whatever may be its value to others, and however much the value to the purchaser himself may have been changed by subsequent events.³

§ 182. *What to be shown to constitute a defence.*—It may be laid down then as a general proposition, not only consonant with the decisions, but the only safe, reasonable, and just rule which could be adopted, that inadequacy of consideration, in order to constitute a defence to a suit for specific performance brought against the vendor, must be shown to have resulted from fraud, surprise, misrepresentation, or concealment on the part of the purchaser;⁴ or

¹ Knobb v. Lindsay, 5 Ohio, 468.

² Hamilton v. Grant, 3 Dow, 33.

³ Dart's V. & P., 513.

⁴ Lowther v. Lowther, 13 Ves., 113; Wall v. Stubbs, 1 Mad., 81; Cadman v.

from unconscionable advantage taken by the purchaser of the vendor's weakness of mind or ignorance.¹ And similar proof is, of course, required from the vendee when he is the defendant. Where a person in a contract for the purchase of real estate agreed to pay a sum for it which was twice its value, and the transaction was free from fraud or misrepresentation, and he examined the land himself, though most of it was at the time covered with snow, it was held that the vendor was entitled to specific performance.² If the vendor sell as trustee, the inadequacy of price may be set up as a defence, but not if the price was fair, although there was afterward an opportunity to sell for a much larger sum.³ It is competent for a parent to enter into an agreement with one of his sons to give him all his property in consideration of his son's promise to support his father and mother as long as they live; and such a contract, when not in writing, stands upon the footing of other parol contracts for a valuable consideration.⁴ The good consideration of love and affection may support a contract where the pecuniary consideration is wholly in-

Horner, 18 Ves., 10; Western v. Russell, 3 V. & B., 187; Lukey v. O'Donnel, 2 Sch. & Lef., 471; Robinson v. Robinson, 4 Md. Ch., 182; Powers v. Hale, 25 N. H., 145; Eastman v. Plumer, 46 Ib., 478; Lee v. Kirby, 104 Mass., 420.

¹ Davis v. Parker, 14 Allen, 94; Todd v. Grove, 33 Md., 188. "Inadequacy of consideration becomes a most material circumstance when one of the parties to a transaction is from age, ignorance, distress, incapacity, weakness of mind, body, or disposition, or from humble position or other circumstances unable to protect himself. In all such cases, whatever be the nature of the transaction, the *onus* of proof rests on the party who seeks to uphold it, to show that the other performed the act, or entered into the transaction voluntarily and deliberately, knowing its nature and effect, and that his consent to perform the act or become a party to the transaction, was not obtained by reason of any undue advantage taken of his position, or any undue influence exerted over him. The mere fact, however, that one of the parties may be an illiterate person, or a man of advanced age, or may be in bad health, or in distress or pecuniary embarrassment, will not vitiate a transaction, although it may have been founded on an inadequate consideration and no independent advice may have been had, if it appear on the face of the evidence that he was fully competent to form an independent judgment in the matter, and became a party to the transaction deliberately and advisedly, knowing its nature and effect." Kerr on Fraud, 189, 190. We have seen, *ante*, § 178, that in cases of sales of reversionary interests, the burden of showing adequacy of price is on the purchaser.

² White v. McGannon, 29 Gratt., 511.

³ Goodwin v. Fielding, 4 De G. M. & G., 90.

⁴ Lester v. Lester, 28 Gratt., 737; Lorentz v. Lorentz, 14 W. Va., 761.

adequate compared with the value of the property;¹ though cases sometimes arise in which inadequacy in contracts between near relatives, from the superiority possessed by one of the parties over the other, may give rise to the presumption of improper influence, and thus furnish a defence to a suit for specific performance. A release from a son to his father was set aside, where the son was turned out of doors and left destitute. "Suppose," said the court, "the plaintiff had been entitled to a tenancy in tail of real estate, and the father, a bare tenant for life, had taken such advantage of his son's necessities to draw him to join in any conveyance which would destroy his remainder, this court, upon very slender evidence of such a practice in a father, has relieved the son."² A conveyance of real estate worth more than nine thousand dollars by a father seventy-four years of age, his wife being nearly seventy years of age and in delicate health, to his two sons, taking from the sons a bond and mortgage to secure the parents' maintenance and an annuity during their lives, the sons having taken advantage of their father's age, imbecility, and partiality for them, was held void.³ Inadequacy of consideration, which would not be a ground for setting aside an executed contract, may induce the court to decline to decree specific performance.⁴ The question of inadequacy would seem to be excluded, when at the time of the contract neither party has any knowledge of the value of the property.⁵

¹ *Whalley v. Whalley*, 1 Mer., 446; *Shepherd v. Bevin*, 9 Gill, 32.

² *Heron v. Heron*, 2 Atk., 161, per Lord Hardwicke.

³ *Whelan v. Whelan*, 3 Cowen, 537.

⁴ *Vigers v. Pike*, 8 Cl. & Fin., 645; *Playford v. Playford*, 4 Hare, 546; *Osgood v. Franklin*, 2 Johns. Ch., 1; 1 Sug. V. & P., 276. "A party who complains that he has been wronged, and brings a bill on such ground, must make out a clear case before he can expect a decree to cancel his own deed. If, however, he repents before the execution of the contract, and stands upon the defensive, he may have all the advantage of his adversary's weakness as well as of his own strength. But whether the vendor comes into court as defendant or as plaintiff before the conveyance or afterward, a gross inadequacy of price is some evidence of fraud, and if fraud is satisfactorily proved, it makes a deed void as readily as articles of agreement." *Black, C. J.*, in *Davidson v. Little*, 22 Pa. St., 245.

⁵ *Knight v. Majoribanks*, 11 Beav., 322; *Affid.* 2 Mac. & G., 10. See 1 Sug. V. & P., 295.

§ 183. *Objection that price was excessive how regarded.*—Cases of alleged excess of price, present strong grounds for refusing specific performance, or for the interference of the court in setting aside the transaction, when there has been fraud, misrepresentation, concealment, oppression, or even ignorance.¹ So, although when the contract is free from imposition, the fact that the price is excessive will not in itself constitute a defence, yet such excess may be taken into consideration by the court in connection with other circumstances, in determining whether or not to grant relief.² Thus, a sale of land was set aside where the consideration was about ten times the value of the land, and the purchase made the condition of a loan which the plaintiff was very anxious to negotiate in order to prosecute his claim in chancery to some valuable property, he being poor and illiterate. “Coupled with such circumstances, the evidence of over-price is of great weight.”³

§ 184. *Inadequacy of bid at public sale.*—Although inadequacy of price is not sufficient of itself to set aside a judicial sale, yet such inadequacy may be a controlling element in connection with other circumstances.⁴ When the sale is fairly conducted, the court will not refuse to enforce specific performance without strong proof of fraud or imposition.⁵ At a sheriff's sale, notes to the amount of two hundred and sixty thousand dollars secured by mortgage were purchased by the complainant for six hundred dol-

¹ Deane v. Rastron, 1 Ans., 64; Young v. Clarke, Prec. Ch., 538; Lewis v. Lord Lechmere, 10 Mod., 503.

Cathcart v. Robinson, 5 Pet., 263.

² Cockell v. Taylor, 15 Beav., 103, 115, per Sir John Romilly.

³ Benton v. Shreeve, 4 Ind., 66.

⁴ In an early case, property having been sold at auction for about half its value, Lord Rosslyn refused specific performance. But Lord Eldon, on a rehearing, expressed the opinion that a sale at auction could not be set aside for mere inadequacy of price. White v. Damon, 7 Ves., 30; and see Underhill v. Horwood, 10 Ib., 209. This is now well settled. Burrowes v. Lock, 10 Ves., 470; Lowther v. Lowther, 13 Ib., 103; Collier v. Brown, 1 Cox, 428; Bower v. Cooper, 2 Hare, 408; Borell v. Dann, Ib., 450; Griffith v. Spratley, 2 Bro. C. C., 179; S. C., 1 Cox, 383; Stephens v. Hotham, 1 K. & J., 571; Russell v. Stimson, 3 Hayw. Tenn., 1; Newman v. Meek, 1 Freem. Miss. Ch., 141; Delafield v. Anderson, 7 Smed. & M., 630; Ready v. Noakes, 29 N. J. Eq., 497.

lars. On the filing of a bill in equity praying for specific performance of the contract of sale, and a demurrer thereto, which was sustained by the U. S. circuit court, this decision was reversed by the U. S. supreme court. The execution sale was admitted by the demurrer to have been open to competition, regular and fair. Catron, J., who delivered the opinion of the supreme court, stated in conclusion, that the complainant had made out a *prima facie* case for a decree, and that it was the duty of the respondents, if they meant to defend, to answer, and show, if they could, that no relief ought to be granted; or, if any, to what modified extent, compared with the entire relief prayed.¹

§ 185. *When inadequacy must have existed.*—The question as to the inadequacy of the consideration must be determined with reference to the time the agreement was made. It has accordingly been held, that where an annuity for life forms part of the consideration, and the life terminates before any payment, this does not necessarily render the consideration inadequate.² Where real estate worth six thousand dollars in gold, was sold, during the Southern rebellion, for ten thousand dollars, payable in Confederate money, payment made, and receipts therefor given by the vendor; and the value of the Confederate money when paid was, in gold, three hundred and eighty-five dollars, upon a bill filed by the vendee after the termination of the war for specific performance, the only defence being that

¹ Erwin v. Parham, 12 How., 197. Nelson, J., dissenting, said: "The inadequacy of consideration is far beyond that of any case that has come under my observation in the course of this examination, and is such as to shock the common sense of mankind. In many of the cases in which the court has refused to interfere mainly on the ground of inadequacy of price, only half the value had been agreed to be given. That was considered as sufficient evidence of a hard and unconscionable bargain to induce the court to pause when its extraordinary powers were invoked to the aid of the party seeking to realize the advantage of the contract, and turn him over to a court of law. The complainant in this case is not without a remedy. If he has got a legal right, he can go into a court of law and enforce it. But I do not think it a fit case for the interposition of a court of equity." See Byers v. Surget, 19 How., 309.

² Mortimer v. Capper, 1 Bro. C. C., 156.

of inadequacy of price, it was held that the plaintiff was entitled to a decree. The court said: "To determine whether the consideration was adequate, and whether the court can now refuse to decree specific performance of the contract on the ground of inadequacy of consideration, we must carry ourselves back to the date of the contract, and the time when the purchase money was paid. If at that time the consideration would have been deemed adequate, and the court would have decreed a specific execution of the contract had this suit then been brought, it follows, I think, necessarily, that the consideration must now be deemed adequate, and the court must now decree such specific execution."¹

§ 186. *Defence from want of consideration.*—Contracts which are voluntary, or where there is no consideration on the part of him who seeks performance, will not be specifically enforced, although under seal, whether the contract be in the form of an agreement, a covenant, or a settlement.²

¹ Hale v. Wilkinson, 21 Gratt., 75. Where, however, a vendor contracted to convey land for a certain sum in Confederate money, which became worthless before the contract was completed and the money paid, the court refused a decree for specific performance, although the plaintiff offered to pay what the Confederate notes were worth at the time of the contract. Love v. Cobb, 63 N. C., 324. See Hudson v. King, 2 Heisk, 561; McCarty v. Kyle, 4 Cold., 349. Specific performance will be refused, where the price is rendered inadequate by the *laches* of the complainant. Whitaker v. Bond, 65 N. C., 290. A grantor who receives a draft drawn by the grantee upon a third person as a consideration for his agreement to convey, must use ordinary diligence to collect the draft, and unless he does, he cannot successfully defend himself against a bill for specific performance on the ground of want of consideration. Woodcock v. Bennet, 1 Cowen, 711. Where the vendor, after entering into the contract, declared himself satisfied, the court decreed specific performance. Woodruff v. Hargrave, Wright, 555; also, where notwithstanding the consideration of a contract for the sale of land was inadequate, the vendor, with full knowledge of the facts, refused to rescind. Galloway v. Barr, 12 Ohio, 354.

² Groves v. Groves, 3 Y. & J., 163; Houghton v. Lees, 1 Jur. N. T., 862; Ord v. Johnston, Ib., 1063; Jeffreys v. Jeffreys, Cr. & Ph., 138; Hervey v. Audland, 14 Sim., 531; Moore v. Crofton, 1 Jones & Lat., 442; Kennedy v. Ware, 1 Pa. St., 445; Mercer v. Stark, Walk., Miss., 451; Forward v. Armistead, 12 Ala., 124; Morris v. Lewis, 33 Ib., 53; Black v. Cord, 2 Har. & Gill, 100; Ormsby v. Huntington, 3 Bibb., 298; Darlington v. McCoolle, 1 Leigh, Va., 36; Buford v. McKee, 1 Dana, 107; Holland v. Hinsley, 4 Iowa, 222; Shepherd v. Shepherd, 1 Md. Ch., 244; Vasser v. Vasser, 23 Miss, 378; Short v. Price, 17 Texas, 397; Tomlinson v. York, 20 Ib., 694. But see Taylor v. James, 4 Dessaus Eq., 5; Caldwell v. Williams, 1 Bailey Eq., 175; McIntire v. Hughes, 4 Bibb., 186; Cabeen v. Gordon, 1 Hill, S. C. Ch., 51; Webb v. Alton, etc., Ins. Co., 10 Ill., 225; Lear v. Chouteau, 23 Ib., 39; Andrews v. Andrews, 28 Ala., 432; Hayes v. Ker-

A. and B., who owned adjoining lands, entered into an agreement, each to lay out a road over his own land, and then B. agreed to convey to A. twenty feet of land, describing it. On a bill by A. against B. for the specific performance of B.'s agreement to convey the land, it was held that there was no sufficient consideration to support the agreement, as it did not appear that the laying out of the road was in any way the inducement to such agreement of B.¹ A minor purchased his time of his father, and subsequently entered a tract of land in his own name, with a land warrant bought solely with his own earnings. The son, by a parol promise unsupported by any consideration, agreed to convey to the father one-half of the tract on the son arriving at maturity. It was held that the father could not enforce a specific performance, although he had contributed money and labor toward improvements on the land, and resided on it with his son.² Equity will not assist in perfecting a voluntary contract to create a trust, nor regard it as binding so long as it remains executory.³ An agreement

show, 1 Sandf. Ch., 261; *Burling v. King*, 66 Barb., 633; *Saunders v. Simpson*, 2 Har. & Johns., 81; *Wyche v. Greene*, 16 Ga., 49. Where there was no consideration for the extension of an agreement for a lease at a low rent, the court refused to extend the term. *Robson v. Collins*, 7 Ves., 133. In another case, the plaintiff had given a bond for twelve hundred pounds to a person who, by an indorsement on the bond, forgave him a portion of the money due. The executors of the obligee having brought an action on the bond, the vice-chancellor refused to restrain it, saying that the plaintiff gave no consideration for the alleged release, and that, as he was a volunteer, he had no right to come into equity for relief. *Tufnell v. Constable*, 8 Sim., 69. Where creditors entered into an agreement to receive a portion of their debt in satisfaction of the whole, the court refused to decree specific performance. *Acker v. Phoenix*, 4 Paige Ch., 305. It is well settled that payment by the debtor of a less sum of money than the real debt forms no valid consideration for an agreement to discharge the residue. And such an agreement will be no satisfaction of the larger sum unless it is under seal, which imports a consideration. *Harrison v. Close*, 2 Johns., 448.

¹ *Dodd v. Seymour*, 21 Conn., 476. Although equity may enforce performance of a deed defectively executed, as an agreement to convey, yet it will refuse to enforce it where it appears to have been made without consideration; and this fact may be shown by parol. *Hanson v. Michelson*, 19 Wis., 498. In Maryland specific performance of an agreement for the purchase of land with Continental money, was always refused as against the vendor, unless he had agreed in writing to convey for such sum as the chancellor should think right, or unless the circumstances of the case were such as to render a decree essential to justice. *Lawrence v. Dorsey*, 4 Har. & McHen., 205; *Hopkins v. Stump*, 2 Har. & J., 301. But see *Chaplin v. Scott*, 4 Har. & McHen., 91.

² *Holmes v. Holmes*, 44 Ill., 168.

³ *Estate of Webb*, 49 Cal., 542.

by the wife to convey land in consideration of an antecedent debt of the husband, is not such an agreement as will be specifically enforced.¹ But a voluntary settlement may be enforced at the instance of a child against the heir, if the volunteer has the preferable equity.² A judicial sale is attended with the same reciprocal rights between the parties as exist in a private contract of sale. And, in each case, the title being retained, specific performance will not be enforced unless a valuable consideration be paid, or offered to be paid, at or before the time of the decree.³ With reference to the consideration there is a distinction between executory contracts or promises which rest *in fieri*, and those agreements which are executed; the one class being enforceable only when founded on a valuable consideration, and the other requiring no consideration, or only a meritorious one. A court of equity will therefore compel the grantor in a voluntary deed, to whom it was delivered after execution for safe keeping, and by whom it was lost, to execute another deed of the same import.⁴

§ 187. *Validity of gifts of land.*—A gift of real estate will be enforced with great caution, and not in general unless the donee has taken possession and made improvements on the faith of the gift.⁵ When he does this, it constitutes a

¹ Bayler v. Com, 40 Pa. St., 27.

² Haines v. Haines, 6 Md., 435. By an ante-nuptial agreement executed by the intended husband and wife, and the wife's parents, the latter agreed to appoint a share of certain real estate (which was subject to their life interest, and to the appointment of them and the survivor of them) to the wife, the husband agreeing to settle his wife's reversionary share upon the usual trusts for husband and wife and their children. The wife's mother having died, the father released the power and granted the estate to take effect after his death, giving his daughter a share. The wife died before her husband, leaving two children. The property being still reversionary, a suit was brought by the husband and one of the children against the other child, the wife's heir at law, for specific performance of the agreement. It was held that the agreement to settle this particular property was clearly binding on the wife, she having assented by being a party to it, and equally so on her heir at law, and that, therefore, there must be judgment for the plaintiffs. Lee v. Lee, L. R. 4, Ch. D. 175.

³ Burgin v. Burgin, 82 N. C., 196. An executory contract, founded on an illegal or void consideration, will not be enforced. Platt v. Maples, 19 La. An., 409; Paton v. Stewart, 78 Ill., 481; Butman v. Porter, 100 Mass., 337.

⁴ Hodges v. Spicer, 79 N. C., 223.

⁵ Callaghan v. Callaghan, 8 Cl. & Fin., 374; Ballard v. Ward, 89 Pa. St., 358.

valuable consideration on which to ground a claim for specific performance.¹ Where complainants alleged a gift of real estate from defendant's testator to complainants' testator, in consideration of natural love and affection, and that the donee pursuant to said gift went into possession of the premises, made large improvements thereon, and finally died in possession thereof, it was held that to entitle the complainants to a decree, there must be conclusive proof of the gift, and satisfactory evidence explaining why the gift was not consummated by a conveyance.² Where, however, the plaintiff's brother, intending to give the plaintiff certain lands, executed a contract for the sale and conveyance of the same to her, she agreeing to pay eleven hundred dollars, but it was never intended that she should pay anything, and subsequently a receipt in full for the purchase price was indorsed by the vendor upon the contract, though no money was in fact paid, it was held that the receipt operated as a valid and complete gift of the debt, leaving the right of the plaintiff to a conveyance in force, as if the debt had been paid.³ Although a court of equity will not give effect to an imperfect gift, yet where a trust is created, either by the owner of the property declaring himself to be a trustee of it, or by his making a complete transfer of it to another as

See *Evans v. Battle*, 19 Ala., 398; *Cox v. Cox*, 59 Ib., 591, *post*, § 284; and see the qualification of this rule as stated, *post*, § 271.

¹ *Gynn v. McCauley*, 32 Ark., 97.

² *Jones v. Taylor*, 6 Mich., 364. As between father and child, the evidence of a parol gift or sale should be direct, positive, express, and unambiguous, its terms clearly defined, and all the acts necessary to its validity have special reference to it and to nothing else.

³ *Ferry v. Stephens*, 66 N. Y., 321. In the foregoing case, the New York special term dismissed the suit on the ground that as there was a mere voluntary executory promise to give land to the plaintiff, specific performance of the contract could not be enforced. The court of appeals, per Andrews, J., in affirming the judgment of the general term reversing this decision and ordering a new trial, said: "The payment of the purchase money by the plaintiff, was made by the agreement a condition precedent to the obligation of the vendor to convey the land; and the plaintiff, in order to entitle herself to specific performance of the contract, was bound to show that payment in fact had been made, or that her promise to pay the purchase money had in some way been satisfied. It is conceded that there was no actual payment of any part of the consideration. The plaintiff, to maintain her right of action, relies upon the fact that her brother,

trustee, the court will enforce the trust against the trustee in favor of volunteers.¹

§ 188. *What deemed a consideration.*—Although to entitle a person to specific performance the contract must in general be upon a valuable consideration, yet the consideration need not be a full equivalent. It is sufficient if some profit is to inure to the promissor, or some detriment to be sustained by the promisee.² If a person is prevented from

about a month after the contract was made, indorsed upon it a receipt in full of the purchase price. The judge also found that the plaintiff's brother, when the contract was made, intended to give her the land, and that the consideration was inserted to conceal this intention from other relatives, and, in connection with the finding that the receipt was subsequently indorsed on the contract, he finds that it was never intended that any payment should be made thereon. These findings, taken together, are equivalent to finding that the vendor, to accomplish his purpose to give the land to his sister, gave her the debt which represented his interest in the land. He became, on the execution of the contract of sale, a trustee for the plaintiff of the land, having a lien for the purchase money, and she became his debtor for the consideration. That the receipt was intended as a gift of the debt, is clearly inferable from the facts found. His primary intention was to give her the land. The gift of the debt would not give her the legal title, but it gave her the whole beneficial interest, provided it operated as a legal satisfaction of her promise. The position of the general term, that when the lien of the vendor under a contract for the sale of land, for the purchase money, is extinguished by payment, or by what, as respects the vendor, was equivalent to payment, he becomes a naked trustee, and is bound to convey to the vendee the legal title, admits of no controversy. There was no intention, in giving the receipt, that the vendor should be discharged from his promise. It states, that the money expressed therein was received to apply on the contract. Whether the giving of a receipt for the debt was effectual to confer the benefit intended, is a question of law; but it is clear from the facts, that the receipt was intended to operate as a forgiving and satisfaction of the plaintiff's obligation under the contract, so as to leave the right of the plaintiff to a conveyance, in force as if the debt had been paid. The case, therefore, comes to this single question, viz, was there a valid gift of the debt to the plaintiff by her brother? The case of *Gray v. Barton*, 55 N. Y., 68, is decisive authority for the plaintiff on this question. The plaintiff does not, in this case, seek the aid of the court to perfect an incomplete gift. The gift of the debt was complete upon the execution of the receipt. The vendor's purpose of giving the land has never been executed, only so far as it results from his giving the plaintiff the debt for the purchase money. The plaintiff's obligation under the contract has been satisfied. The only unperformed stipulation remaining, is that of the vendor to convey the land, and this action is brought to enforce that stipulation."

¹ *Kelly v. Walsh*, L. R., Ir. Ch. D., 275.

² *Curlin v. Hendricks*, 25 Texas, 225. A., upon being applied to by B. and C., agreed to grant them a lease of a supposed vein of seam coal called the S. vein, "about two feet thick, with the overlying and underlying beds of clay," on and under a certain farm, at one hundred pounds a year as certain or dead rent, and royalties at nine pence per ton for the coal and four pence per ton for the clay; the lessees to have any part of the farm at the rent of ten pounds per acre, and to expend not less than five hundred pounds in the erection of a manufactory and buildings for the purpose of working the coal and clay. In a suit by A. for specific performance, it was claimed on the part of the defence that the S. vein

performing an intended act, or omits to make certain arrangements, provisions, or gifts, by will or otherwise, for other persons by reason of the promise of another, equity will decree specific performance of such promise.¹ Where a parol license was given without consideration, allowing the person licensed to divert a stream of water, and the licensee erected obstructions diverting the water, and expended large sums in building a saw-mill which would be of much less value without such diversion, and the licensor removed the obstructions, it was held that equity would compel the specific performance of the license.² A written contract made before, and in consideration of, marriage, is such a contract as the court will aid in enforcing.³ A controversy having arisen between parties concerning a will, and an agreement of compromise entered into, specific performance was decreed without inquiry into the sufficiency of the consideration.⁴

was not under the farm, and evidence was given that it could not be found, while the plaintiff insisted that no sufficient search had been made. *Bacon, V. C.*, in holding that the plaintiff was entitled to a decree for specific performance, and to an order for the payment of the dead rent which had accrued up to that time, stated the grounds of his decision thus: "I think that the thing bargained for was simply the right to go upon the land and search for and get minerals, and make such a use of it as they thought fit. They knew the hazard attending it, and knowing it, they protected themselves by having the lease made determinable at the end of three years. . . . They have tried experiments which appear not to have been very conclusive (for one of the witnesses says it was in the wrong place), and have not yet found any coal. It would be against reason, against justice, and against the whole chain of authorities to let the defendants off their bargain." *Jefferys v. Fairs*, L. R. 4, Ch. D. 448.

¹ *Mead v. Randolph*, 8 Texas, 191. A representation made by one party for the purpose of influencing the conduct of the other party and acted on by him, will in general be sufficient to entitle him to the assistance of the court for the purpose of realizing such representation. *Coles v. Pilkington*, L. R. 19, Eq. 174. See *ante*, § 54.

² *Rerick v. Kern*, 14 Serg. & Rawle, 267.

³ *Gevers v. Wright*, 18 N. J. Eq., 330. See *ante*, § 43.

⁴ *Leach v. Forbes*, 11 Gray, 506. Where land is dedicated to a county on condition that a certain town is made the county-seat, such contract may be specifically enforced on the county complying with the condition. *Reese v. Lee County*, 49 Miss., 639. A step-father agreed with his step-son, who was just of age and about to leave home, that if he would work the farm and take care of the family he should have a deed of one-half of the farm, which agreement was held to have been distinct and definite as to land and consideration, and that upon a substantial performance of the consideration the step-son was entitled to a specific performance of the contract. *Twiss v. George*, 33 Mich., 233. Where

§ 189. *What meant by a failure of consideration.*—With regard to the failure of the consideration as a defence, it is scarcely necessary to say that by this is not meant the non-payment of the purchase money according to the agreement, the liability to pay, though default be made, being a consideration; but the failure of the contract by the occurrence of something which either determines the existence of the subject matter or materially effects it. If the subject matter be not essentially affected, though there may be a claim for compensation, the party injured will not be entitled to be discharged from the contract. Events which, happening before the conclusion of a contract, avoid it, either by determining the existence of the subject matter or materially affecting it, do not, properly speaking, terminate the contract, but prevent the contract from arising.¹

§ 190. *Failure of consideration with reference to personal property.*—Where a contract is entered into in relation to personal property, it is implied not only that there

a husband and wife accepted the offer of an aged person in poor health, that if they would live in a certain house and give himself and his nurse lodging therein and board, and would take care of him until his death, he would convey the house to the wife, and they fulfilled their agreement with the old man until he died nine months afterward, and expended two hundred dollars in repairing the house, on a bill by them against his heirs for specific performance, it was held that the consideration was sufficient and that a decree should be granted. *Watson v. Mahan*, 20 Ind., 223. Plaintiff alleged that the defendant, in consideration of love and affection, executed to his son a deed of a tract of land, which, without being registered, was left with the father for safe keeping, and that, after the son's death, the father destroyed the deed. The father, in his answer, admitted the execution of the deed, but stated that the consideration therefor was an agreement that the son should support him and his wife during their lives, but that such agreement was afterward rescinded. Held, that as the defendant had failed to make good his defence by full proof, he should be decreed to convey the premises to the heir of the son. *Thomas v. Kyles*, 1 Jones Eq., 302.

¹ Where a contract was entered into for the sale of an estate in fee, in remainder, or an estate tail, a conveyance executed, and a bond given for the purchase money, and it was discovered that at the time of the contract no such remainder existed, the tenant in tail having suffered a recovery, the court set aside the contract, and ordered the bond to be delivered up and repayment to be made of the interest which had been paid on it. *Hitchcock v. Giddings*, 4 Price, 135. When a purchaser has an opportunity and is urged by the vendor to inspect property and ascertain for himself its value, and neglects to do so and there is no fraud, he will not be relieved from the purchase on the ground of partial failure of consideration. *Vincent v. Berry*, 46 Iowa, 571.

is such property, but that it exists in the form, and is of the description, stated in the contract. A person who resided abroad, being entitled to an annuity for his life, assigned it in 1847 to certain trustees to be disposed of by them for his benefit. The plaintiff entered into a correspondence by letter with the trustees upon the subject of the purchase, but the terms of the purchase were not finally settled until the 28th of February, 1849. Upon the 6th of that month the annuitant died. The purchase money was paid by the plaintiff in ignorance of the fact, and was subsequently received by the executors of the deceased. It was held, that as at the time of the purchase of the annuity it had ceased to exist, the plaintiff was entitled to recover the purchase money from the executrix, on the ground that the money had been paid without consideration. The court said: "The question between the parties is this, whether the purchase took effect during the existence of the annuity. If it did, but for an instant, the plaintiff is not entitled to succeed; for he purchased the annuity and cannot complain that, in so doing, he has made a bad bargain as the event has turned out. But if, on the contrary, the annuity had ceased to exist before his purchase, then he has got nothing for his purchase money, and is entitled to recover it back from the defendant."¹ So, where an action was brought to recover the price of a cargo afloat, supposed to exist, and to be capable of transfer, but which had been sold and delivered by the captain to others before the contract of sale was made between the plaintiff and defendant, it was held there could not be a recovery.² Where the plaintiff sold a clock, and a horse which he warranted, for a harness and two promissory notes, and the horse proved to be worthless, it was held that there was such a failure of consideration as to authorize the defendant to rescind the entire contract.³

¹ Strickland v. Turner, 7 Exch., 208.

² Hastie v. Couturier, 9 Exch., 102; 5 House of Lds., 673.

³ Morrill v. Aden, 19 Vt., 505. Where two agreements are contained in the same instrument and connected as counterparts of one mutual arrangement,

But if it unexpectedly transpire that the chattel, though in existence at the time of the sale, was then in an impaired condition, the 'contract will notwithstanding be binding; as where a ship at sea is sold, which happens to be stranded, the subject of the contract still remaining.' Although, when the subject matter of the contract has ceased to exist, the impossibility of performing the agreement would prevent the interference of equity, if on other grounds it could give relief, yet a person may so contract as to preclude himself from objecting the non-existence or determination of the subject matter at the time of the contract.²

§ 191. *Where property is sold by order of court.*—A question has arisen in cases of sales by the court, as to the time at which the contract becomes complete; because until the report has been confirmed, the bidding may be reopened and a re-sale directed. The point to be determined is, whether the contract is concluded by the sale, subject to be defeated by the opening of the sale, in which case the contract will relate back to the day of sale; or whether it is not concluded until it becomes absolute and indefeasible by confirmation. The former of these views seems the more reasonable, and is sustained by the weight of authority.³

each being based upon, and forming to some extent the consideration for, the other, the failure of one part of the arrangement will be a sufficient reason for the court to refuse to compel compliance with any part of it. *Butman v. Porter*, 100 Mass., 337.

¹ *Barr v. Gibson*, 3 M. & W., 390.

² *Hanks v. Pulling*, 25 L. J. Q. B., 375. It is not enough for the defendant to prove that the consideration is less valuable than it was supposed or estimated to be when the contract was made. A note is given, the consideration of which is one thousand barrels of flour at a stipulated price per barrel. No part of the flour is delivered. Here would be an entire failure of consideration. If but five hundred barrels are delivered, there is a partial failure of consideration to that extent; but the maker of the note cannot rely upon the defence that there was a partial failure of consideration, and sustain the same by proof that the flour was of less value than the contract price. *Baker v. Thompson*, 16 Ohio, 504.

³ *Vesey v. Elwood*, 3 Dr. & W., 74, per Lord St. Leonards; *Anson v. Towgood*, 1 J. & W., 637, per Lord Eldon. But see *Minor, ex parte*, 11 Ves., 559; *Twigg v. Fifield*, 13 Ib., 517. The latter view was supported by Lord Langdale, who is reported to have said: "By the established rule of the court the

§ 192. *Injury from inability of party to fulfil at time agreed.*—The question on whom a benefit or loss resulting after a private contract has been signed will fall, and whether the court will enforce specific performance without regard to such benefit or loss, or whether it will discharge the contract, may depend upon the title.¹ The contract is binding from the date of the signature if there be a good title, though that be not shown until afterward. “It is the established doctrine of equity that if a contract to purchase is to be completed at a given period, and the title is finally made out, the parties continuing in treaty, and the purchaser not by any acts released from his bargain, the estate is considered as belonging to the purchaser from the date of the contract, and the money from that time as belong-

purchaser is to be considered the owner of the estate from the date of the order confirming the report.” *Robertson v. Skelton*, 12 Beav., 260, 265. It seems, however, that in the case before Lord Langdale the question arose after the confirmation, which deprives it of the weight it would have had if the circumstances had been after the sale, but before the confirmation. *Fry on Specif. Perform.*, 264. But see *Busey v. Hardin*, 2 B. Mon., 407; *Owen v. Owen*, 5 Humph., 352. In *Robb v. Mann*, 1 Pa. St., 300, in which the subject was discussed, *Rogers, J.*, in delivering the opinion of the court, said: “The first question which solves the whole difficulty is, to whom the property belonged in the intermediate time between the sale and its confirmation by the orphan’s court; or, in other words, was it the property of the administrator or heirs, or the property of the purchaser. For the loss, of whatever kind, and by whom caused, must be borne by the owner. Had there been a private sale, it would hardly be considered an open question; for if there be any point settled, it is that, when a contract is made for the sale of land, equity considers the vendee as the purchaser of the estate sold, and the purchaser as a trustee to the vendor for the purchase money. So much is the vendee considered, in contemplation of equity, as actually seized of the estate that he must bear any loss which may happen to the estate between the agreement and the conveyance, and he will be entitled to any benefit which may accrue to it in the interval. And the reason assigned is that, by the contract, he is the owner of the premises to every intent and purpose in equity. This principle, which is indisputable, would seem decisive of the question, unless a distinction can be taken between a private and a judicial sale. But no such distinction has been recognized; rather the reverse has been ruled.” See *Stoever v. Rice*, 3 Whart., 25; *Bashore v. Whisler*, 3 Watts, 494; *Morrison v. Wurtz*, 7 Ib., 437; *Bellas v. M’Carthy*, 10 Ib., 22. As to mode of sale under order of court in Maryland, see *Andrews v. Scotton*, 2 Bland’s Ch., 629.

¹ Some of the earlier English cases held that to bind the purchaser the title must have been actually accepted by him. But if the vendor is able to give a good title, its acceptance or non-acceptance by the vendee at the date of the contract would seem unimportant. See *Wyvill v. Bishop of Exeter*, 1 Price, 292, 295, *n.*; *Paine v. Meller*, 6 Ves., 349.

ing to the vendor."¹ But if the making out of the title is unreasonably delayed by the vendor, though without *laches* on his part, and the purchaser is likely to sustain serious loss thereby, specific performance will not be decreed against him. Accordingly, where the vendor was delayed a long time in making title to one-sixth of the property in consequence of being unable to find the deed, which was recorded in the clerk's office, but omitted from the index of deeds, and meanwhile the property had greatly depreciated in value, it was held that the purchaser would not be compelled to take it.² And where the vendor was not in a condition to convey a clear, unincumbered title when the house on the property was consumed by fire, it was held that the purchaser was not bound to complete.³ On the other hand, if unexcused delay in payment at the time stipulated in the contract has produced a material change of circumstances, making the contract more onerous on the vendor, equity will not decree its performance against him.⁴

§ 193. *In case of conditional agreement.*—When the contract is conditional the property does not pass from the vendor to the purchaser upon the conclusion of the contract, but only when the contract becomes absolute by the performance of the condition;⁵ and until then the property

¹ Harford v. Purrier, 1 Mad., 538, per Sir Thomas Plumer. See Rawlins v. Burgis, 2 Ves. & Bea., 387; Revell v. Hussey, 2 Ball & Beatt., 287; Brewer v. Herbert, 30 Md., 302.

² Griffin v. Cunningham, 19 Gratt., 571. ³ Christian v. Cabell, 22 Gratt., 82.

⁴ Andrews v. Bell, 56 Pa. St., 343; Booten v. Scheffer, 21 Gratt., 474. Where the value of the property has materially changed, or great financial events have essentially altered the relative value of money and land, a party will not be permitted to lie by until the change sets in his favor and then ask for specific performance. Merritt v. Brown, 19 N. J. Eq. (4 C. E. Green), 286.

⁵ Where a son received a conveyance from his father in consideration of support, the court decreed a re-conveyance without requiring money paid by the son for taxes to be refunded. Penfield v. Penfield, 41 Conn., 474. A. granted to B. the right to use certain water power and to dig a race on A.'s land, in consideration of erecting a mill at a specified place. B. having diverted the water from A.'s land, and erected his mill at a different place from the one agreed, it was held that A. was entitled to a re-conveyance, and that B. should be enjoined from setting up his deed in defence in any action for a previous diversion of the water. Jacox v. Clarke, Walk. (Mich.) Ch., 508. Where the owner of a judgment of two hundred dollars agreed to release it at a future day on payment by the judgment debtor of one hundred dollars and the surrender by him

is at the risk of the vendor. A contract for a lease for five years from April 1st, 1840, provided that the lessor should erect by that time a new warehouse on the premises and repair the old warehouse, and that the rent should be regulated by the amount expended on the buildings. The new warehouse was not completed, nor the old one repaired by the time agreed, but no objection was made by the intended lessee, who remained in possession of part of the premises under a former agreement. Shortly afterward the whole premises were destroyed by fire. The lessor having brought a suit to compel the lessee to rebuild and to accept a lease, it was held that if time were of the essence of the contract, it had been waived by the defendant, but that this did not release the obligation of the lessor to rebuild, and that the defendant was not bound to accept a lease until that was done ; and, furthermore, treating the contract to take a lease as a contract to purchase, the warehouse was not purchased by the defendant until it was completed by the plaintiff, and until that was accomplished it was not the property of the lessee nor at his risk.¹

§ 194. *Losses to be borne by vendee.*—Since, after the contract has been fully concluded, the property sold is at the risk of the purchaser, it follows that subsequent losses or gains cannot determine the contract.² Accordingly, where, after the making of the contract, houses on the property sold are destroyed by fire, the loss must be borne by the purchaser.³ So, a contract to sell an annuity will not be discharged by the death of the annuitant, although it occurs previous to payment.⁴ And where a contract was entered

of all claim to certain land, and the consideration failed except the payment of one hundred dollars, the court refused to decree a specific performance, but directed that the judgment should be credited with such payment. *Davis v. Bowker*, 1 Nevada, 487.

¹ *Counter v. Macpherson*, 5 Moo. P. C. C., 83.

² *Revell v. Hussey*, 2 Ball & B., 287. This obvious principle does not seem always to have been adhered to. See *Davy v. Barber*, 2 Atk., 489 ; *Stent v. Bailis*, 2 P. Wms., 217 ; *Pope v. Roots*, 1 Bro. P. C., 370.

³ *Paine v. Meller*, 6 Ves., 349.

⁴ *Mortimer v. Capper*, 1 Bro. C. C., 156 ; *Jackson v. Lever*, 3 Ib., 605.

into between two persons and a merchant that the former should be taken by the latter into partnership for a period of eighteen years in consideration of a sum to be paid by instalments, and before the instalments were all paid the merchant became insolvent, it was held that the assignees were entitled to the remaining instalments.¹

§ 195. *Termination of interest.*—In England the question has been considerably discussed, and somewhat different views entertained, by the courts, as to what ought to be done when a contract which was capable of being performed at the time of bringing the suit has become, by lapse of time between that and the hearing, incapable of performance so as to confer future benefits.² The following rule seems to have been adopted: Where a suit for specific performance is brought after the interest has expired, or so near to its expiration as that by the ordinary course of the court a decree cannot be rendered until after it shall have determined, the bill will be dismissed. But when the plaintiff at the time of bringing his suit has a right to specific performance, and the interest expires before the hearing by reason of delay wholly due to the court, he may have an account or other equitable relief to which he may be entitled, and perhaps “the execution of a legal instrument, where that would confer on him important legal rights to which he was entitled at the filing of the bill.”³

¹ Akhurst v. Jackson, 1 Swanst., 85; and see Coles v. Trecothick, 9 Ves., 246. Where money was left to be invested in land for the use of A. in tail, remainder to B. in fee, and A. and B. agreed to divide the money, and before the agreement could be carried out A. died without issue, the agreement was nevertheless specifically enforced. Carter v. Carter, Forrest, 271.

² See Nesbitt v. Meyer, 1 Swanst., 223; Walters v. Northern Coal Mining Co., 5 De G. M. & G., 629; Hoyle v. Livesey, 1 Mer., 381; Wilson v. Torkington, 2 Y. & C. Ex., 726, 728; Strickland v. Turner, 7 Ex., 208.

³ Fry on Specif. Perform., 269.

CHAPTER VI.

CONTRACT NOT MUTUAL.

- 196. Rule as to mutuality.
- 197. Examples illustrating the rule.
- 198. In cases where the court would have no jurisdiction to enforce the contract against the plaintiff.
- 199. Exceptions to rule as to time of mutuality.
- 200. When optional agreements enforced.
- 201. Where only one party signs the contract.
- 202. Objection that contract is not mutual how waived.
- 203. Where the vendor agrees to convey more than he is able.
- 204. When interest of vendor cannot be ascertained.
- 205. Where partial interest of vendor if conveyed will impair the rights of third persons.
- 206. Inability of vendor to convey more than a small portion of premises.

§ 196. *Both parties must be bound by contract.*—To entitle a party to specific performance, there must not only be a valid and binding agreement ; but, as a rule, the contract, at the time it was entered into, must have been capable of being enforced by either of the parties against the other.¹

¹ Boucher v. Vanbuskirk, 2 A. K. Marsh, 345 ; Hutchison v. McNutt, 1 Ohio, 14 ; Ohio v. Baum, 6 Ib., 383 ; Cabeen v. Gordon, 1 Hill, S. C. Ch., 51 ; McMurtree v. Bennette, Harr. Ch., 124 ; Hawley v. Sheldon, Ib., 420 ; Benedict v. Lynch, 1 Johns. Ch., 370 ; German v. Machin, 6 Paige Ch., 288 ; Beard v. Linthicum, 1 Md. Ch., 345 ; Bodine v. Glading, 21 Pa. St., 50 ; Jones v. Noble, 3 Bush., Ky., 694 ; Rider v. Gray, 10 Md., 282 ; Reese v. Reese, 41 Ib., 554 ; O'Brien v. Pentz, 48 Ib., 562 ; Ewins v. Gordon, 49 N. H., 444 ; Richmond v. Dubuque, etc., R.R. Co., 33 Iowa, 422 ; Tarr v. Scott, 4 Brews. Pa., 49. "It has been held that the performance of a contract, on one side, entitles the party performing to equitable assistance against the other, though, upon the application of the latter, the court could not have compelled performance in his favor. A contract with an infant has been held to be enforceable by him after he becomes of age, notwithstanding the want of mutuality in the first instance, the same effect being given to the contract in equity as at law. A lessee may enforce a contract to renew a lease which could not be enforced against him. But this results from the prior lease, and the nature of the contract itself, and can hardly be regarded as an exception to the rule. A contract between a trustee and his *cestui que trust* may be enforced by the latter ; but not by the former. And, under certain circumstances, a voluntary settlement may be enforced by the beneficiary, who could not, of course, be compelled to accept it. In these cases, however, there are considerations which override the principle of mutuality ; and we are not aware of any case involving a reciprocity of obligation, in which a contract has been enforced in favor of a party who had not actually performed it, or could be compelled to do so. It is safe to say that no such case exists, and that equity will not interfere in favor of one of the parties, where it is incapable of doing justice to the other, by enforcing the entire contract according to its terms." Cope, J., in Cooper v. Pena, 21 Cal., 403.

In other words, there must be mutuality both as to the obligation and the remedy. It follows, that a party not bound by the agreement itself, has no right to call upon the court to enforce performance against the other contracting party by expressing a willingness in his bill to perform his part of the agreement.¹ As was said by Lord Redesdale,² "This would not be equity, that a party not bound by the agreement itself, should be permitted, at his option, and when he find it to his advantage to do so, to compel the other party to perform, when, if the advantage were the other way, he could not himself be coerced to performance on his part." It is immaterial what constitutes the want of mutuality, whether resulting from personal incapacity, from the nature of the contract, or from any other cause. Whenever the absence of the essential element is ascertained to exist on the part of one of the contractors, and for that reason is incapable of being enforced against him, he will be equally incapable of enforcing the contract against the other party. The obligation is mutual where both parties are required by the agreement to do something; the promise of the one being a consideration for that of the other. It makes no

¹ *Duvall v. Myers*, 2 Md. Ch., 401; *Meason v. Kaine*, 63 Pa. St., 335. Where a person entered into a contract for the sale of property belonging to his wife, it was held that he could not compel fulfilment on the part of the purchaser by afterward tendering a deed executed by both husband and wife. *Luse v. Dietz*, 46 Iowa, 205.

² 1 Sch. & Lef., 18.

³ A similar thought was expressed in *Tucker v. Clarke*, 2 Sandf. Ch., 96, in which the court said: "The executed contract was, that the complainants were seized of the lots, and that if they were not, they should repay the consideration money. This is sought to be reconsidered, and turned into a contract by which if it should turn out that they were not seized, they might either repay the consideration or procure a good title to be conveyed. It would have been a little more plausible if there were a semblance of mutuality about it, so that the defendant might have coerced them to procure a good title on discovering the defect. But there is no pretence that the defendant had any such equity. The complainants' ground amounts to this: if the lots had become worth two or three times the price which the defendant paid for them, then they could set up the outstanding title, deprive the defendant of his speculation, and throw him upon the covenants of his deed, which would restore to him the consideration paid. If, on the other hand, the lots should depreciate very much, the complainants would procure the outstanding title for him, and retain the price which he paid. There is no equity or fairness in this, and the court cannot grant the relief prayed by the bill without first making such a contract for the parties." See *Maynard v. Brown*, 41 Mich., 298.

difference in this respect whether the obligation of the one is secured by bond, and that of the other not thus secured, nor, that when the cause comes on for hearing, the plaintiff's part of the agreement has not actually been performed, if its fulfilment is tendered, and can be secured by the same decree which compels specific performance by the defendant, especially if he has sustained no damage, or none which cannot be compensated by the decree.¹

§ 197. *Illustrations of rule.*—In accordance with the rule stated in the preceding section, an infant cannot enforce an agreement against an adult, because a suit for specific performance cannot be maintained by the latter against the infant.² So, where land for which a contract of sale was given, was owned by two persons, and the purchaser supposed that he was dealing with only one of them, and that he was the sole owner, and there was nothing on the face of the agreement which could give the purchaser a claim against the owner not named for his interest in the contract, it was held that as there was a want of mutuality, specific performance could not be decreed.³ A., without any authority from B., signed an agreement for the sale of land as the agent of B. and C. Held that C. could not alone be compelled to perform, since the vendee, at the time of entering into the agreement, did not assent to a contract binding on one vendor only, and there was therefore no mutuality, whether B. had any interest in the land or not.⁴ An agreement purporting to be executed by the heirs of A., a very aged man, provided for making an inventory and division of the property of A., real and personal, the division to be made "as we, the undersigned, may hereafter agree on." The per-

¹ *Ewins v. Gordon*, *supra*.

² *Flight v. Bolland*, 4 Russ., 298; *ante*, § 123. Where an adult made an agreement with others for the distribution of property, founded on a sufficient consideration, and free from fraud or mistake, it was held that specific performance would be decreed whether the other parties to the contract were adults or minors, provided there was mutuality in the contract, and in the remedy. *Smith v. Smith*, 63 Ga., 184.

³ *Bronson v. Cahill*, 4 McLean, 19.

⁴ *Snyder v. Neefus*, 53 Barb., 63.

sons who signed the agreement were the sons and some of the sons-in-law of A., the daughters of the latter not being parties, nor A. Upon the father afterward surrendering all the personal property to the sons-in-law, and conveying the land to the son, the sons-in-law filed a bill against the son for a specific performance of the agreement. Held, that as the daughters who were not parties to the agreement, could not be compelled to make an equal division of the land, there was no mutuality between the plaintiffs and defendant, and the former must therefore be left to whatever remedy the law would give them.¹ A. and B. were rival bidders for a contract with the government. The proposals of A. were ultimately accepted; but before such acceptance, he entered into an agreement with B., signed by himself alone, that upon B. giving the required security, and paying a certain sum, he would sell the contract to B. Held, that as B. nowhere agreed that he would buy the contract, it could not be enforced for want of mutuality.² So, a grant from A. to B. of the privilege of digging ore on A.'s land at twenty-five cents per ton, is not mutually binding, there being no obligation on B. to dig ore; and it will not for that reason be specifically enforced.³ Where, in a suit for the specific performance of a contract, it appeared that the object of the defendant, and which he believed was secured by the contract, was to have the minerals on his farm worked, as well as explored, which he agreed might be done by the plaintiff, but the only engagement on the part of the latter was to make explorations, it was held that as there was no reciprocity of obligation, the bill must be dis-

¹ *Brewer v. Church*, 4 Jones Eq., 418. "If the agreement had been executed by all of the children of A., and provided for an equal division of his property among them with his consent, it would have been a question whether equity would not have sustained it against any one of them who should have subsequently obtained a conveyance from the father inconsistent with it; it having been held that if two expectant devisees or legatees agree to divide equally whatever devises or legacies they may take under the will of a particular testator, the agreement of one shall be regarded as a valuable consideration for that of the other, and the contract will be enforced in equity." *Ib.* per Battle, J.

² *Woodward v. Harris*, 2 Barb., 439.

³ *Yenger v. Green*, 4 Gill, 672. 4
Geiger

missed.¹ A contract which provides that one of the parties may abandon the contract on giving a year's notice, cannot be enforced for want of mutuality.²

§ 198. *Court must be able to enforce contract against plaintiff.*—Specific performance will not in general be decreed in favor of a person where the court would have no jurisdiction to enforce the contract against him, if it should be called upon to do so.³ Where a contract was entered into for the lease of a railroad, the lessee to permit the lessor to run carriages over the road, provide engines for them, and keep the road in repair during the term, the court refused to compel the lessor to execute the lease, because it could not enforce specific performance on the part of the lessee.⁴ And where the plaintiffs had agreed, for a money consideration, to perform services in working a railway which were of such a nature that the court could not have enforced them against the plaintiffs, specific performance was refused.⁵ So, where the object of the suit was, in effect, to compel specific performance of the grant of an office, it

¹ *Tyson v. Watts*, 1 Md. Ch., 13.

² *Marble Co. v. Ripley*, 10 Wall, 339. A contract for the sale of real estate is not only bad for uncertainty, but for the want of mutuality, which provides that the purchaser shall erect on the land a certain building without other description. *Mastin v. Halley*, 61 Mo., 196.

³ *Gervaise v. Edwards*, 2 Dr. & W., 80; *Hills v. Croll*, 2 Phil., 60. "The court does not give relief to a plaintiff, although he be otherwise entitled to it, unless he will, on his part, do all that the defendant may be entitled to ask from him; and if that which the defendant is entitled to, be something which the court cannot give him, it has been the generally understood rule that that is a case in which the court will not interfere." *Wigram, V. C.*, in *Waring v. Manchester*, etc., R.R., 7 Hare, 492. If what is to be done by the plaintiff is intended to rest in contract only, specific performance may be decreed, the court having power to compel the plaintiff to execute a deed with the stipulated covenants; and it will be no objection that the covenants are not of a nature to admit of a decree for specific performance. *Wilson v. West Hartlepool R.R.*, 2 De G. J. & S., 475; *Onions v. Cohen*, 2 H. & M., 354. But where the defendant has stipulated for the actual performance of the acts, the court will not compel him to perform the contract specifically on his part, and to be satisfied with a deed from the plaintiff. *Stocker v. Wedderburn*, 3 K. & J., 393.

⁴ *Blackett v. Bates*, L. R. 1, Ch. 125.

⁵ *Johnson v. Shrewsbury & Birmingham R.R. Co.*, 3 De G. M. & G., 914; *Stocker v. Wedderburn*, 3 K. & J., 393; *Ord v. Johnson*, 1 Jur. N. S., 1063; *Hill v. Gomme*, 1 Beav., 540; *Bromley v. Jefferies*, 2 Vern., 415. But see *Hope v. Hope*, 22 Beav., 364; S. C., 26 L. J. Ch., 417; *Vansittart v. Vansittart*, 4 K. & J., 62.

was held that as the duties and services incident to the office were personal and confidential in their character, and specific performance could not have been decreed against the plaintiff at the suit of the defendant, the plaintiff could not sue the defendant, though there were no personal duties to be performed by the latter.¹

§ 199. *When not a defence.*—It follows from the rule that the mutuality of an agreement is to be judged of at the time it is made, that it will not constitute an objection to specific performance, that the defendant, by his *laches* or other acts or omissions, has lost his right to enforce the contract against the plaintiff; a party not being permitted to take advantage of his own neglect:² as where a railroad company, after agreeing to purchase land, allows the time, during which by their statutory powers they can purchase the land, to expire.³ The rule as to time, is to be taken with this qualification, that notwithstanding the contract, when it is entered into, be incapable of specific performance by one of the parties, or of being enforced against him, yet if the obligation to perform be mutual, and the obstacle to performance be subsequently overcome, a decree may then be rendered. If the plaintiff has performed his part of the agreement, specific performance may be decreed, although the contract, so far as concerned performance by the plaintiff, was originally beyond the jurisdiction of the court.⁴ Accordingly, in the case of a

¹ Pickering v. Bishop of Ely, 2 Y. & C. C. C., 249.

² Southeastern R.R. Co. v. Knott, 10 Hare, 122; *ante*, § 174.

³ Hawkes v. Eastern Counties R.R. Co., 1 De G. M. & G., 737, 755; S. C., 5 House of Lds., 331, 365. *Contra*, Stuart v. London & Northwestern R.R. Co., *Ib.*, 721. It will be no objection to decreeing a specific performance in favor of the plaintiff, that by a subsequent contingent event, it could not be enforced against him. Thus, if by the contingent event of the death of the vendor before making the conveyance, specific performance could not be enforced against the vendee because the latter could not get the title he contracted for, it would not follow that the vendee could not enforce specific performance against the heirs of the vendor. For if A. has contracted to sell B. land, and to make him a perfect title, he must be able to show such title, or he cannot enforce specific performance; while, in the same case, B. may enforce a specific performance against A. if he is willing to take A.'s defective title. Moore v. Fitz Randolph, 6 Leigh, 175.

⁴ Dietrichsen v. Cabburn, 2 Phill., 52. In a suit by a married woman, if she

contract for the building of houses on different plots of ground, and for granting separate leases of the plots as soon as the houses were finished, it was held that although the court could not specifically enforce the contract for building, yet, when the houses were finished, specific performance would be decreed for the leases, and that the building of all of the houses was not an essential condition to specific performance as to the lease of each plot.¹ The principle under consideration, has been applied to contracts for personal services. Thus, where a county, through its board of supervisors, entered into a contract with an individual to prosecute its claim to certain lands, he to receive as compensation, in case he succeeded, one-half of the lands, or the indemnity granted in lieu thereof, and, after more than five years of services, he recovered the claim in full, it was held that he was entitled to a decree for specific performance.² Where, however, the consideration for a conveyance of land to the plaintiff, was personal services to be rendered by him, part of which he had

has fully performed on her part, an objection by the other party that she could not have been compelled to perform, comes too late. *Seager v. Barnes*, 4 Minn., 141. See *Fenelly v. Anderson*, 1 Ir. Ch., 417, where it was held that a contract by a purchaser with a husband and wife, was not bad for want of mutuality, and might be enforced by them. In a suit to enforce the specific performance of a contract to convey certain land, it was urged that as the vendee was a married woman, she was not bound by the contract, and consequently there was no mutuality. But as it appeared that she had taken possession, and made improvements on the land, it was held that as the contract might in equity be enforced against her, and the unpaid purchase money be declared a charge upon her separate estate, there was not such a want of mutuality as to defeat her action. *Chamberlin v. Robertson*, 31 Iowa, 498. "The disability of a married woman whereby she is exempted from the obligation of her contracts, is not created by the law for the benefit of those who contract with her, but for the protection of her and her husband. Those contracting with her cannot seek benefits and immunities on account of this disability, nor be relieved of their obligations, unless they would be exposed to loss, or subjected to injustice by reason of the fact that the contract cannot be enforced against her. If it appears certain that a party contracting with a married woman will not thus suffer on account of her disability, as in the case where she has performed her obligation, or has done that which is the consideration for the promise of the other party, or when the consideration is secure to him, in such cases, her disability cannot be set up as a defence to an action against him upon the contract." *Ib.*, per Beck, J. *Contra*, *Tarr v. Scott*, 4 Brews. Pa., 49.

¹ *Wilkinson v. Clements*, L. R. 8, Ch. 96.

² *Allen v. Cerro Gordo*, 40 Iowa, 348; S. C. 34 *Ib.* 54.

rendered, it was held that as he could not be compelled to complete them, he was not entitled to a decree for specific performance, and that an offer to perform them was not equivalent to actual performance.¹

§ 200. *Where a party has an option.*—An exception to the doctrine of mutuality arises when but one party to the contract is entitled to performance: as where a landlord covenants to renew the lease upon the request of the lessee,² or where the agreement is in the nature of an undertaking.³ Unilateral or optional contracts are not favored in equity, and it has been held both in England and this country that want of mutuality of obligation and remedy is a bar to specific performance.⁴ But it is well settled that an optional agreement to convey, or to renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it;⁵ though such an agreement can perhaps scarcely be called an exception; for, being in fact a conditional contract, when the condition has been made absolute by a compliance with its terms, the contract becomes mutual and capable of enforcement by either party. A contract for the sale of real estate at the option of the vendee only, upon election and notice, may not only be specifically enforced, but the refusal of the vendor to

¹ Cooper v. Pena, 21 Cal., 403. In this case, "the court rightly, and in entire accord with the authorities, held that as the court could not specifically enforce the performance of the personal services, the remedy was not mutual." Vassault v. Edwards, 43 Cal., 458, per Rhodes, J.

² Chesterman v. Mann, 9 Hare, 206. See Bell v. Howard, 9 Mod., 302, 304.

³ Palmer v. Scott, 1 R. & M., 391.

⁴ Lawrenson v. Butler, 1 Sch. & Lef., 13; Parkhurst v. Van Cortlandt, 1 Johns. Ch., 282; Benedict v. Lynch, Ib., 370; Smith v. McVeigh, 3 Stoct., 239.

⁵ Hatton v. Gray, 2 Ch. Cas., 164; Seton v. Slade, 7 Ves., 265; Fowle v. Freeman, 9 Ib., 351; Western v. Russell, 3 Ves. & B., 192; Ormond v. Anderson, 2 Ball & B., 363; Clason v. Bailey, 14 Johns., 484; *In re Hunter*, 1 Edw. Ch., 1; Woodward v. Aspinwall, 4 Sandf., 272; Hawralty v. Warren, 18 N. J. Eq., 124; Vandoren v. Robinson, 16 Ib., 256; Green v. Richards, 23 Ib., 32; Schroeder v. Gemeinder, 10 Nevada, 355.

accept the purchase money will not destroy the mutuality, though the vendee could thereupon withdraw his election.¹ If the owner of a piece of land executes an instrument in writing by which he promises to convey the land to another provided the latter will erect a house worth five thousand dollars on it within one year, and pay the owner a certain price for the land within two years, and such person erects the house within the appointed time, without dissent by the owner, and then tenders the stipulated price and demands a deed, a court of equity will decree a conveyance. The mutuality and consideration consist in the fact that the vendee has done, upon the promise of the vendor, what the latter required ; and it is immaterial that it was done without entering into a previous undertaking to do it.² A lease

¹ *Corson v. Mulvany*, 49 Pa. St., 88; *Boston & Maine R.R. v. Bartlett*, 3 Cush., 224. Where a lease was given with the option of the lessee to purchase the property within a certain time for a given sum, it was held that the offer to sell formed a part of the consideration, and could not be withdrawn by the lessor before notice of an election to purchase. *Suffrain v. McDonald*, 27 Ind., 269. The court said : " Numerous authorities are cited upon the point that a mere offer to sell may be withdrawn at any time before it is accepted. That such is the law cannot be controverted. But the agreement under consideration is not a mere naked proposition to sell the lot, nor can it be regarded as separate and distinct from the lease of the lot and the consideration stated in the agreement. The stipulations on the one side to lease the lot for a period of two years, with the right of the lessees within that time to purchase the same at the price and on the terms stated in the agreement, and on the other to pay the rent agreed upon, and to erect the fence, must be considered as constituting one entire agreement, each particular stipulation forming an inducement thereto. The agreement to pay the rent and build the fence must be deemed to have been made in consideration, as well for the privilege of becoming the purchasers of the lot, as for its use." And see *Stansbury v. Fringer*, 11 Gill & Johns., 149, to the same effect, in which the court said : " Where a contract consists of several distinct and separate stipulations on one side, and a legal consideration is stated on the other, it must be considered that the entire contract was in the contemplation of the parties in each particular stipulation, and formed one of the inducements therefor, and no one stipulation can be supposed to result from, or compensate for, the consideration, or any part of it, exclusive of other stipulations, unless the parties have expressly so declared ; and this will be the case, whether the consideration be a sum of money to be paid in gross, or a specific act to be performed, or several payments in money, or several acts to be performed." And see *D'Arras v. Keyser*, 26 Pa. St., 249.

² *Perkins v. Hadsell*, 50 Ill., 216. See *Kerr v. Purdy*, 50 Barb., 24 ; 51 N. Y., 629. A written proposition to sell land, signed by the vendor alone, stating that he has sold the land to the purchaser for a certain sum, a portion of which has been paid, and that the money paid is to be returned if the title prove bad or be rejected, the vendee to be allowed twenty days in which to examine the title, is capable of being specifically enforced. *Vassault v. Edwards*, 43 Cal., 458 ; *Smith & Fleek's Appeal*, 69 Pa. St., 474. An estate under contract of

having been given with a stipulation that the lessee should have the privilege of purchasing the land during the continuance of the term, it was held, reversing the judgment of the court below, that the agreement giving the option to purchase was not a mere personal covenant, but a right; which, though resting solely with the lessee, might be transferred to his vendee, and enforced at his election with the same effect as if the contract had been absolute in its terms.¹ "The privilege conceded to the lessee to purchase within the term of the lease is as much a term of the contract and binding upon the lessor as any other term of the instrument. The lessee, it is true, was not bound to purchase. But, upon a good consideration, the lessor bound himself to sell if the lessee wished to buy. It may be that this was only a proposition until accepted by the lessee; but, upon his acceptance, it became a valid agreement. It is not easy to perceive why a man may not as well agree to sell property upon the condition that another will consent to buy, as upon any other condition, or absolutely."² Such a stipulation in a lease is in the nature of a continuing offer to sell, and when accepted by the lessee a contract of sale is completed.³ Where a lessor covenanted, for a sum named, to sell and convey the property to the lessee at any time before the expiration of the lease, it was held that the filing of a bill before the end of the term by the assignees of the lessee, alleging that the complainants were ready to pay the

sale is regarded as converted into personalty from the time of the contract, notwithstanding an election to complete the purchase rests entirely with the purchaser; and if the seller die before the election is exercised, the purchase money when paid will go to his executors as assets. *Baden v. Pembroke*, 2 Vern., 213. But if, from defect of title, insufficiency of contract, or from other cause, the court should think that the contract ought not to be enforced, the estate will go to the heir of the vendor as though no contract had ever existed. *Lacon v. Waters*, 3 Atk., 1; *Buckmaster v. Harrop*, 7 Ves. Jr., 341; *Rose v. Cunynghame*, 11 Ib., 550.

¹ *Kerr v. Day*, 14 Pa. St., 112.

² *Baldwin, J.*, in *De Rutte v. Muldrew*, 16 Cal., 505. And see *Laffan v. Nagle*, 9 Ib., 662; *Hall v. Canter*, 40 Ib., 65.

³ *Willard v. Tayloe*, 8 Wall, 557; *Napier v. Darlington*, 70 Pa. St., 64.

stipulated sum and desired a conveyance, entitled them to a decree for specific performance.¹

§ 201. *Where contract is signed by only one party.*—There may be a mutual contract to which both parties have given their assent, though the evidence of such assent may exist in a different form as regards the two parties. As to one, it may be verbal, while the other's is expressed by his signature in writing; and the latter may be bound to perform his contract, while the former might avoid his, by reason of the statute of frauds.² It has been said that the ground upon which courts of equity proceed in such cases, is, that as the statute of frauds requires only the signature of the party to be charged, to become legally binding upon him, equity, finding a contract legally binding, will decree its performance.³ Another reason suggested, is, that by filing the bill, the plaintiff has waived the original want of mutuality, and rendered the remedy mutual.⁴ Both of these reasons have been objected to as insufficient; but the principle is well settled. Thus, specific performance has been enforced of a deed poll.⁵ So also of a bond.⁶

¹ Mauglin v. Perry, 35 Md., 352.

² Hatton v. Grey, 5 Vin. Abr., 527, Pl. 17; S. C., 2 Cas. in Ch., 164; Backhouse v. Crosby, 2 Eq. Cas. Abr., 32. See Morgan v. Holford, 1 Sm. & Gif., 101; Old Colony R.R. Corp. v. Evans, 6 Gray, 25; *post*, § 239. Where the defendant alone signed a contract in writing, and the plaintiffs acted on this promise of the defendant, and expended large sums in carrying out the conditions and stipulations of the agreement on their part, it was held that the plaintiffs were entitled to a decree for specific performance. Old Colony R.R. Corp. v. Evans, *supra*. See Douglass v. Spears, 2 Nott. & McCord, 207; Clason v. Bailey, 14 Johns., 484; M'Crea v. Purmort, 16 Wend., 460; *In re Hunter*, 1 Edw. Ch., 5. "The bargain was undoubtedly mutual, although the parties might not have been equally vigilant in obtaining the legal written evidence to prove it." Parker, C. J., in Penniman v. Hartshorn, 13 Mass., 91. A written agreement for a sale of goods reciting that the seller agrees to deliver the goods, describing them, to the buyer, naming him, for a given sum, delivery to be made in a specified manner, at a time indicated, "cash on delivery," is a valid contract at common law, capable of being specifically enforced if accepted by the buyer, without proving that the latter ever signed a promise to accept or pay for the goods; the words "cash on delivery" importing a promise to pay when the goods are delivered. Justice v. Long, 42 N. Y., 493.

³ Rogers v. Saunders, 16 Me., 92, per Shepley, J.

⁴ Fowle v. Freeman, 9 Ves., 351; Western v. Russell, 3 V. & B., 192; Martin v. Mitchell, 2 J. & W., 413; Flight v. Bolland, 4 Russ., 298; Shirley v. Shirley, 7 Blackf., 452.

⁵ Otway v. Braithwaite, Finch, 405.

⁶ Butler v. Powis, 2 Coll. C. C., 156.

§ 202. *Waiver of objection.*—Notwithstanding the contract be incapable of enforcement for want of mutuality, the objection may be waived by the other party. Where, for instance, a person contracts to sell that to which he has no title, or not such as he agrees to convey, and the agreement is not mutual on account of the inability of the vendor to fulfil, if the purchaser proceed with the negotiation by investigating the title, or concurring in proceedings for the purpose of remedying the defect, he cannot afterward set up the original want of mutuality in the contract after the title is satisfactorily completed.¹ So, where, owing to the relation the parties sustain toward each other, there is no mutuality of obligation, the contract binding one and not the other, the latter may, by suit, waive his personal exemption, and specifically enforce the contract: as in the case of a suit by a *cestui que trust* against his trustee for the performance of a contract of sale; such a contract being obligatory on the trustee, but not on the beneficiary.²

§ 203. *Where there can only be a partial performance.*—Although when it is not in the power of the vendor to convey all he agreed to do, he cannot enforce the contract against the purchaser, yet the latter will be entitled to all the vendor is able to convey, with compensation for what is lacking. “If a man, having partial interest in an estate, chooses to enter into a contract representing it and agreeing to sell it as his own, it is not competent to him afterward to say, that though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under these circumstances

¹ *Salisbury v. Hatcher*, 2 Y. & C. C. C., 54; *Hoggart v. Scott*, 1 R. & M., 293.

² *Lacey, ex parte*, 6 Ves., 625. Another example is presented in the case of a voluntary settlor who is incapable of enforcing the contract against the purchaser. Yet the latter may waive the want of mutuality, and enforce it against him. *Smith v. Garland*, 2 Mer., 123; *Johnson v. Legard*, T. & R., 281; *Buckle v. Mitchell*, 18 Ves., 100. Although an infant cannot waive his exemption from liability on his contracts, during his minority, yet if he brings the suit after he is of age, specific performance will be decreed. *Vassault v. Edwards*, 43 Cal., 458.

is bound by the assertion in his contract ; and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement ; and the court will not hear the objection by the vendor that the purchaser cannot have the whole."¹ The principle under consideration was illustrated in the following case : A., who was tenant for life of certain estates, agreed with B. that the latter should open and work certain mines, and enjoy the minerals raised for ten years, if A. or his issue male should so long live, at a yearly rent of twenty-five pounds. A suit for specific performance having been brought by B., A. objected that as he was only tenant for life, and subject to account for waste, the agreement was inconsistent with his power. Specific performance was, however, decreed with compensation.²

¹ Lord Eldon in *Mortlock v. Buller*, 10 Ves., 315; and see *Atty. Gen. v. Day*, 1 Ves. Sen., 224; *Milligan v. Cooke*, 16 Ves., 1; *Dale v. Lister*, *Ib.*, 7; *Hill v. Buckley*, 17 *Ib.*, 394; *Western v. Russell*, 3 V. & B. 187; *Neale v. Mackenzie*, 1 Ke., 474; *Bennett v. Fowler*, 2 Beav., 302; *Sutherland v. Briggs*, 1 Hare, 26, 34; *Wilson v. Williams*, 3 Jur. N. S., 810; *Hooper v. Smart*, L. R. 18, Eq. 683; *post*, § 499.

² *Cleaton v. Gower*, Finch, 164. And see Lord Boilingbroke's case, 1 Sch. & Lef., 19, referred to in *Gt. Western R.R. Co. v. Birmingham & Oxford Junction R.R. Co.*, 2 Phil., 605. The ground taken by the court in these and similar cases, has not been uniformly sustained by the authorities. A tenant for life contracted with A. B. to grant a lease which required the consent of trustees. The consent was refused, the agreement being in fraud of the power. In a suit brought by A. B. against the tenant for life, he insisted that he was at least entitled to such a lease as the tenant for life could grant out of his estate. The bill was, however, dismissed for want of mutuality. Lord Chancellor Redesdale said: "No man signs an agreement but under a supposition that the other party is bound as well as himself; and, therefore, if the other party is not bound, he signs it under a mistake." The court held that the principle above stated, is only applicable where, on the faith of an agreement, one party has put himself in a situation from which he cannot extricate himself, and is therefore willing to forego part of his agreement in order to save himself from the injury he would sustain unless he were to get such an execution of the contract as the defendant could give. *Lawrenson v. Butler*, 1 Sch. & Lef., 13. In another case, the same lord chancellor, in remarking upon the specific performance of contracts by a tenant for life exceeding his power, said: "I think courts of equity should never enforce such contracts, whether with the view to the party himself, or to the person entitled in remainder. In the first place, it is unconscionable in the tenant for life to execute such a lease, because it brings an incumbrance on the estate of the remainder-man, and puts him to litigation to get rid of it. As to the tenant for life himself, it is compelling him to do what is to be the foundation of a future action for damages if he die before the twenty-one years. The court will never do this, but will leave the party at once to bring his action for damages. And I also conceive that this sort of contract, obtained by a person who knew at the time the nature of the title, is unconscionable in him, as he makes himself a party knowingly to that which is a fraud on the remainder-man; and under such cir-

§ 204. *Extent of deficiency incapable of computation.*—There is an obstacle to the exercise of the jurisdiction, where the difference in value between the interest agreed to be conveyed, and the interest possessed by the vendor, cannot be ascertained. In cases of this nature, performance will not be enforced with compensation; for while the vendor has no claim to the interposition of equity, there is nothing to guide the court in affording a remedy. Thus, where a person agreed to sell the fee, and the interest he was able to convey, was a life estate and an ultimate remainder in fee in default of issue male, a decree for specific performance was withheld.¹ So, where compensation was sought for the difference between arbitrary and fixed fines, the former being likely to vary as the property increased in value, it was held that as it was impossible to compute such a difference, a reference to the master for that purpose, was erroneous.² But it will of course be competent for the purchaser to take the vendor's interest without compensation, if he choose to do so.

§ 205. *Where partial performance would injure a stranger.*—If, notwithstanding the interest of the vendor, less than that contracted for, be capable of ascertainment, such partial interest may, if conveyed, impair the rights of third persons in the property, specific performance will not be decreed. Accordingly, where a tenant for life without impeachment of waste, under a strict settlement, entered into a contract for the sale of the fee, the court refused to compel him to convey his life interest, on the ground that

cumstances he had no claim to the assistance of a court of equity.” *Harnett v. Yielding*, 2 Sch. & Lef., 549. These views are different from those entertained by other judges. They were distinctly disapproved by Lord St. Leonards in *Dyas v. Cruise*, 2 John. & Lat., 460, 487, where in speaking of the dismissal of the bill in *Lawrenson v. Butler*, *supra*, he said: “I doubt whether that can be maintained, as the law of the court, where there is no fraud in the transaction. If there be a *bona fide* intention to execute the power, and the contract cannot be carried into effect, I do not see why the interest of the tenant for life should not be bound to the extent he is able to bind it, unless there is some inconvenience.”

¹ *Thomas v. Dering*, 1 Ke., 729. See *post*, § 507.

² *White v. Cuddon*, 8 Cl. & Fin., 766.

a stranger would be likely to prejudice the rights of those in remainder by committing waste.¹

§ 206. *In case of a very great deficiency.*—The contract will not be enforced when a large part of the property cannot be conveyed: as where a person agreed to sell a manufactory, and it was found that he owned only nine-sixteenths of the whole, and that they were subject to a debt which would absorb nearly all of the purchase money.² When, however, the contract shows that the intention was to sell whatever interest the vendor had, specific performance will be decreed, notwithstanding there is a great difference between the property supposed to have been sold, and that which the vendor can convey; the purchaser in such case taking upon himself the risk of not getting all he expected. Where, for instance, persons who only owned two twenty-first parts, agreed to sell two sixth parts, with all other their rights and interests in the property, the contract was enforced; such a case being altogether different from a contract for the sale of an entirety where the vendor has a title to only a part.³ It has been doubted whether, where the purchaser knows that it is out of the power of the vendor to convey the whole of what he contracts for, he will be entitled to what the vendor can convey.⁴ Where the vendors owned but three-fourths of the property they contracted to sell, which the purchaser knew, or had good reason to believe, when he brought his suit, it was held that, though he might have maintained an action for damages, yet as he had filed a bill for specific performance, he was not entitled to any abatement of the purchase money, but that he might have, without abatement, the three-fourths which the vendors could convey.⁵ If the purchaser is aware of an intended fraud by the vendor, he will not be entitled to that which the vendor can convey.⁶

¹ Thomas v. Dering, *supra*; Wythes v. Lee, 3 Drew, 396. And see Graham v. Oliver, 3 Beav., 124; Cleaton v. Gower, Finch, 164. But see *post*, § 510.

² Wheatley v. Slade, 4 Sim., 126.

³ Jones v. Evans, 17 L. J. Ch., 469.

⁴ Beeston v. Stuteley, 27 L. J. Ch., 156. See *post*, § 506.

⁵ Maw v. Topham, 19 Beav., 576.

⁶ O'Rourke v. Percival, 2 Ball & B., 58; Fry on Spec. Perform., 142.

CHAPTER VII.

ILLEGALITY OF CONTRACT.

- 207. Illegal contracts not enforced.
- 208. Presumption in favor of legality of contract.
- 209. On what principle defence allowed.
- 210. Relative delinquency of the parties when considered.
- 211. In case of illegality of consideration.
- 212. Where an act resulting from an illegal contract is a valid consideration for a lawful agreement.
- 213. Contracts illegal at common law, as against public policy.
- 214. Where the consideration is to do an immoral act.
- 215. Contract how affected by prohibition in statute.
- 216. In case of an usurious contract.
- 217. Gaming and wagering contracts, and such as are entered into to embarrass criminal prosecutions.
- 218. Contracts unlawful from the relation sustained by the parties toward each other.

§ 207. *Where it is in violation of law.*—No court will lend its aid to give effect to a contract which is illegal, whether it violate the common or the statute law, either expressly or by implication.¹ Such a contract cannot be enforced even with the consent of the parties;² nor though, after the making of the contract, the statute is repealed;³ or notwithstanding it was legal when it was entered into and has since become illegal.⁴ In the latter case, however,

¹ Knowles v. Haughton, 11 Ves., 168; Ewing v. Osbaldiston, 2 Myl. & Cr., 53; De Begnis v. Armistead, 10 Bing., 107; Gas Light Co. v. Turner, 7 Scott, 779; Wetherell v. Jones, 3 B. & Ad., 221; Seidenbender v. Charles, 4 Serg. & Rawle, 159; Hall v. Mullin, 5 Har. & Johns., 193; Scott v. Duffy, 14 Pa. St., 18; Boutwell v. Foster, 24 Vt., 485; Brian v. Williamson, 7 How. Miss., 14; Buxton v. Hamblen, 32 Me., 448. "It is a well-settled principle of the common law that no court of justice will lend its aid to enforce the performance of any contract or agreement which was intended by the parties thereto to contravene the provisions of a positive law, or the performance of a contract which is contrary to public policy." Pratt v. Adams, 7 Paige Ch., 615, per Walworth, Ch.

² Fowler v. Scully, 72 Pa. St., 456.

³ Gilliland v. Phillips, 1 S. C., 52.

⁴ Atkinson v. Ritchie, 10 East., 530, 534; Barker v. Hodgson, 3 M. & S., 267; Esposito v. Bowden, 4 Ell. & Bl., 963. And see Winnington v. Briscoe, 8 Mod., 51.

the court will seek to carry out the intentions of the parties so far as it can be done without a violation of the law.¹

§ 208. *Burden of proof*.—A contract will be presumed to be legal until the contrary is shown; and if it be susceptible of two constructions, one legal and the other illegal, the former will be adopted.² The burden of proof therefore rests on the party taking the objection, though there has been some difference of opinion on this point. Thus, in one case it was held that before the specific performance of a contract would be decreed, it must be shown that there was not a reasonable ground for claiming that the agreement was illegal, or against the policy of the law.³ While, in another case, the court said: "The agreement must be legal or illegal, and it is not within the discretion of the court to refuse specific performance because an agreement savors of illegality. It must be shown to be illegal."⁴ "The power to declare a contract void for being

¹ *Bettesworth v. Dean of St. Paul*, Sel. Cas. in Ch., 66. Although a court will not lend its aid to carry out an illegal contract, yet if the contract is actually at an end, or is put an end to, the court will interfere to prevent those who have obtained under the illegal contract money belonging to other persons on the representation that the contract was legal, from keeping the money. *Sykes v. Beadon*, L. R. 11, Ch. D. 170. A distinction has been made between the case of one of two parties to an illegal contract suing the other party, and the case of his suing a third person for money received under the contract. In *Tenant v. Elliott*, 1 B. & P., 3, there was an illegal contract between the plaintiff and a third person. The defendant received money from the third person to the use of the plaintiff. In an action by the plaintiff against the defendant to recover the money, it was held that although the plaintiff could not have forced the third person to pay under the illegal contract, yet that he was entitled to sue the defendant, who could not set up the illegality of the contract, having received the money for the use of the plaintiff. In *Farmer v. Russell*, 1 B. & P., 296, there was an illegal contract between the plaintiff and a third person at C. to deliver counterfeit half-pence to the latter. The defendants were carriers employed by the plaintiff to deliver the goods, and to receive the money. In an action by the plaintiff against the carriers to recover the money, it was said that the original contract being illegal they could not be compelled to pay. It was, however, decided against them, the money having been paid over at C. for the plaintiff's use.

² *Mittelholzer v. Fullarton*, 6 Q. B., 989; *Lewis v. Davison*, 4 M. & W., 654, 657. "Illegality is never presumed; on the contrary, everything must be presumed to have been legally done until the contrary appear." *Bennett v. Clough*, 1 B. & A., 461.

³ *Johnson v. Shrewsbury & Birmingham R.R. Co.*, 3 De G. M. & G., 914. And see *City of London v. Nash*, 3 Atk., 512; S. C., 1 Ves. Sen., 12.

⁴ *Aubin v. Holt*, 2 K. & J., 66. And see *Sissons v. Dixon*, 5 B. & C., 758; 8 D. & R., 526; *Gale v. Leckie*, 2 Stark, 107.

in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, it should be exercised only in cases free from doubt."¹

§ 209. *Ground of objection.*—The defence of the illegality of contracts differs from that of fraud, which is private and personal and capable of being waived by the injured party, in its being for the public benefit, rather than out of regard to individual interests. This follows from the very constitution of courts which are instituted to administer justice in accordance with the law. "The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds, at all times, very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, not for the sake of the defendant, but because the court will not lend their aid to such a plaintiff. So, if a plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it."² The principle on which this defence rests is shown by this: that where, in a suit for specific performance, a fact not put in issue by either party comes out on the evidence affecting the legality of the contract, it will be noticed by the court, which, before proceeding, will direct an inquiry.³ Such a defence, however, when the defendant has had the benefit of the contract, is not regarded by the court with entire favor.⁴

§ 210. *Where the parties are not equally guilty.*—The court, in such cases, acts, in a certain sense, irrespective of

¹ Richmond v. Dubuque, etc., R.R. Co., 26 Iowa, 191.

² Lord Mansfield in Holman v. Johnson, Cowp., 343. And see Parsons v. Thompson, 1 H. Bl., 322; Moore v. Adams, 8 Ohio, 372; Foote v. Emerson, 10 Vt., 338; Rowan v. Adams, 1 Sm. & Marsh, 45.

³ Parken v. Whitby, T. & R., 366; Evans v. Richardson, 3 Mer., 469.

⁴ Shrewsbury & Birmingham R.R. Co. v. London & Northwestern R.R. Co., 16 Beav., 44.

the moral obligation of the parties. If two persons agree to do some unlawful act to which both are privy, and one fulfils on his part, the other has no moral right to refuse performance of that which is not immoral outside the general end of the contract. But such refusal is a wrong for which no remedy is afforded by law. Unless, however, the parties are *in pari delicto*, as well as *particeps criminis*, the court will afford relief to the more innocent party, where equity requires it.¹ "In respect to offences in which is involved any moral delinquency or moral turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-doers."²

¹ Reynell v. Sprye, 21 L. J. Ch., 633, 651; Tracy v. Talmage, 14 N. Y., 162; Freelove v. Cole, 41 Barb., 318. In the case last cited, A. obtained from B. and his wife, without consideration, a conveyance of B.'s farm, containing about one hundred and fifteen acres, on a parol promise to reconvey the same to B.'s wife. A. refused to fulfil his agreement, and set up in defence to a suit brought against him by B. and wife for specific performance, that such conveyance was made by B. to hinder, delay, and defraud his creditors. It was proved that B., at the time of the conveyance, had become incompetent to manage his business with ordinary prudence and discretion, that A. was B.'s son-in-law, and an attorney, and that he was applied to by B. and his wife for advice to aid them in the disposition of the property, and that the same was conveyed to A. at his instance. It was further shown that the object of B. in making the conveyance to A., was to place the property, for the time being, beyond the reach of B.'s creditors, and then to have it conveyed to B.'s wife, to be held by her for the support of B. and his family. Held, that the parties were not *in pari delicto*, and that the decree of the court below that the defendant execute and deliver a conveyance of the property to B.'s wife, should be affirmed with costs. In Ford v. Harrington, 16 N. Y., 285, A. was in debt to B. in the sum of sixty dollars. A. had a contract for certain land, worth about four hundred dollars, on which there was an unpaid balance of thirty-six dollars. C., an attorney-at-law, being applied to by A., to know if his creditor could reach this land, C. replied in the affirmative, and advised A. to assign the contract to him, to prevent its being subjected to the claim of B., saying that when he had settled with B. he would reassign the contract to A. A. having followed the attorney's advice, the latter refused to do as he had agreed. It was held that, as C. was an attorney, the law would set aside the agreement made with his client by which the property was put into his hands to keep it out of the reach of his client's creditors, and that C. should convey the land to A. The decision was put upon the ground that C. took advantage of the trust and confidence reposed in him to procure the assignment, and that the parties were not *in pari delicto*, and it was not conformable with the rules of equity to allow a man to retain an advantage thus obtained. See Sandfoss v. Jones, 35 Cal., 481.

² Wilde, J., in Lowell v. Boston & Lowell R.R. Co., 23 Pick., 24. And see

§ 211. *Where the consideration is unlawful.*—The illegality may be as to the consideration, or as to the stipulations of the contract. A court will not enforce an executory contract founded on an illegal consideration : as where a creditor agreed with his debtor that if the latter would secure the claim of the former, he would dismiss proceedings in bankruptcy commenced by him, such a contract being an abuse of the process of the law ;¹ or where a bidder at an auction sale agreed with A., who was present at the sale, that if A. would not bid against him he would divide the land with him, such an agreement being a fraud on the vendor.² So, specific performance will not be decreed of a contract growing immediately out of and connected with an act, or with another contract which is illegal or immoral ;³ as where the price paid for real estate was greatly less than the land was worth, and the purchase was made in order to enable the vendor to leave the State to avoid a prosecution for felony.⁴ If part of an entire consideration is illegal, the contract is void ;⁵ but it is other-

Mount v. Waite, 7 Johns., 434 ; Atlas Bank v. Nahant Bank, 3 Metc., 581. " Where both parties are *in delicto*, concurring in an illegal act, it does not always follow that they stand *in pari delicto* ; for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of age or condition, so that his guilt may be far less in degree than that of his associate in the offence. And besides, there may be, on the part of the court itself, a necessity of supporting the public interest or public policy, in many cases, however reprehensible the acts of the parties may be." Story's Eq. Juris., Sec. 300. See Browning v. Morris, 2 Cowp., 790 ; Osborne v. Williams, 18 Ves., 379 ; Smith v. Bromley, 2 Doug., 696 ; Wheaton v. Hibbard, 20 Johns., 290. The general rule that courts will not enforce contracts prohibited by statute, nor allow the recovery of money paid in pursuance of them, but will leave the parties without remedy, whenever they are *in pari delicto*, is not applicable when the contract is prohibited for the mere protection of one of the parties against an undue advantage which the other party is supposed to possess over him. Deming v. State, 23 Ind., 416 ; Scotten v. State, 51 Ib., 52.

¹ Paton v. Stewart, 78 Ill., 481.

² Whitaker v. Bond, 63 N. C., 290.

³ Armstrong v. Toler, 11 Wheat., 258 ; Wilson v. Spencer, 1 Rand, 76 ; Bowman v. Cunningham, 78 Ill., 48.

⁴ Dodson v. Swan, 2 W. Va., 511.

⁵ Featherston v. Hutchinson, Cro. Eliz., 199 ; Schackell v. Rosier, 3 Scott, 59 ; Crawford v. Morrell, 8 Johns., 253 ; Donallen v. Lenox, 6 Dana, 91 ; Woodruff v. Heniman, 11 Vt., 592.

wise where the consideration is legal, and some of the stipulations only, which are separable, are illegal.¹

§ 212. *Validity of transaction irrespective of the agreement.*—An act may be done, which, though resulting from an illegal contract, is a valid consideration for a lawful agreement; as the transfer of stock, the agreement to do which is contrary to a statute against stock-jobbing.² Where a trust is created in order to carry out an agreement in itself incapable of being enforced, which trust is lawful and independent of the contract, except so far as the latter may be necessary to explain the constitution of the trust, the trust may be enforced, and thus the contract be specifically performed. Accordingly, where two persons entered into a contract for the division of an estate to be recovered, which agreement could not be enforced on account of champerty, and he who was to convey part of the estate to the other, by a codicil, directed the contract to be carried out, and created a trust for the purpose, specific performance was decreed against the trustee.³ And a trustee to whom money is paid on account of a third person, cannot set up the illegality of the trust under which the money was so paid, though the *cestui que trust* could not have enforced his right against the payer directly, as, in that case, he could only have obtained the money through the illegal agreement.⁴

§ 213. *Agreements void as against public policy.*—A contract may be illegal at common law, as against public policy, or on the ground that it is immoral; or it may have been rendered illegal by statute. The subject is too extensive to admit or justify anything more than a cursory treatment here. A contract void as against public policy in which the parties are equally at fault, if still executory, will not be enforced, nor damages be awarded for its breach;

¹ Leavitt v. Palmer, 3 N. Y., 19.

² M'Callan v. Mortimer, 9 M. & W., 636.

³ Powell v. Knowler, 2 Atk., 224.

⁴ Thomson v. Thomson, 7 Ves., 470; Tenant v. Elliott, 1 B. & P., 3. See *ante*, § 207.

and, if the contract be executed, the law will not restore the price paid, nor the property delivered.¹ A contract injuriously affecting the revenue of the country cannot be enforced;² and the same is true of an agreement in general restraint of trade;³ but not if the restraint is only partial.⁴ Agreements whereby parties stipulate not to bid against each other at a public auction, especially on a sale of chattels or other property on execution, are void as against public policy. And so, if under-bidders or puffers are employed at an auction to enhance the price and deceive the bidders, and they are in fact misled.⁵ But an association of individuals may be formed for the purpose of purchasing property either at public or private sale; this being nothing more than a limited partnership for a special object.⁶ The following contracts are void:—to procure the passage of an act of the Legislature by any sinister means, or by using

¹ *Setter v. Alvey*, 15 Kansas, 157; *Marksbury v. Taylor*, 10 Bush., 519.

² *Smith v. Mawhood*, 14 M. & W., 452; *Meux v. Humphries*, 3 C. & P., 79.

³ *Alger v. Thatcher*, 19 Pick., 51.

⁴ *Tallis v. Tallis*, 18 Eng. L. & Eq., 151; *Pierce v. Woodward*, 6 Pick., 206; *Chappel v. Brockway*, 21 Wend., 158; *Mott v. Mott*, 11 Barb., 127; *Hoagland v. Segar*, 28 N. J., 230; *Dwight v. Hamilton*, 113 Mass., 175; *Roller v. Ott*, 14 Kansas, 600; *Brown v. Rounsavell*, 78 Ill., 589; *Peltz v. Eichele*, 62 Mo., 171; *Oregon Steam Navigation Co. v. Winsor*, 20 Wall, 64. Although it is the policy of the law not to permit persons to be placed under general restraints of trade, even by their own acts or agreements, yet an agreement creating only a partial or particular restraint, is valid, if entered into upon a good and adequate consideration. In *Mitchel v. Reynolds*, 1 P. Wms., 181, Chief Justice Parker, afterward Lord Chancellor Macclesfield, held that a bond conditioned not to exercise a certain trade within a particular parish, during the period of five years, was good; it appearing by the recital in the bond that the obligor had assigned to the obligee a lease of the premises where the obligor had previously carried on the business, which he stipulated not to follow in the same parish within a given time. In *Davis v. Mason*, 5 Term. R., 118, Lord Kenyon applied the same principle to a bond given by one surgeon to another, who, in consideration of being taken into business with the obligee as assistant, bound himself not to exercise his professional skill and business on his own account within the distance of ten miles, for the period of fourteen years. *Chessman v. Nainby*, 2 Stra., 739; 1 Bro. P. C., 234, is to the same effect. Courts of equity, acting upon the same principle, give effect to agreements in restraint of a particular trade or business when the same are founded upon a sufficient consideration; and a specific performance will be decreed. *Bryson v. Whitehead*, 1 Sim. & Stu., 74; *Noah v. Webb*, 1 Edw. Ch., 603.

⁵ *Jones v. Caswell*, 3 Johns. Cas., 29; *Doolin v. Ward*, 6 Johns., 194; *Wilbur v. How*, 8 Ib., 444; *Bartle v. Coleman*, 4 Pet., 184; *Craig v. State of Missouri*, Ib., 436.

⁶ *Platt v. Oliver*, 2 McLean, 267.

personal influence with the members;¹ but not an agreement for purely professional services in obtaining the passage of a law—such as drafting the petition, collecting facts, attending to the taking of testimony, preparing arguments, and submitting them to a committee or other proper authority;² an agreement to pay for procuring a contract from the government to furnish its supplies;³ to resign a public position to make room for another;⁴ to exchange offices;⁵ to aid another in obtaining his appointment to office;⁶ not to bid for the labor of the inmates of a house of correction;⁷ a contract to procure signatures and obtain the pardon from the governor of a person convicted and sentenced for crime;⁸ an agreement by a railroad company not to have or use a depot within a specified distance of a certain place;⁹ to pay the directors or other agents of a railroad company, in money or land, on condition the road is located on a certain route, or that a depot is established at a particular place;¹⁰ a combination among parties applying for a street improvement, by which a few individuals, anxious to have grading and paving done, procure the acquiescence of others by paying them therefor.¹¹ An agreement to waive a right in contravention of State policy can-

¹ *Marshall v. Balt. & Ohio R.R. Co.*, 16 How., 314; *Clippinger v. Hepbaugh*, 5 Watts & Serg., 315; *Harris v. Roof*, 10 Barb., 489; *Rose v. Truax*, 21 Ib., 361; *Usher v. McBratney*, 3 Dillon, 385.

² *Trist v. Child*, 21 Wall, 441.

³ *Tool Co. v. Norris*, 2 Wall, 45.

⁴ *Parsons v. Thompson*, 1 H. Bl., 322; *Eddy v. Capron*, 4 R. I., 395.

⁵ *Stroud v. Smith*, 4 Houst. Del., 448.

⁶ *Gray v. Hook*, 4 N. Y., 449.

⁷ *Gibbs v. Smith*, 115 Mass., 592.

⁸ *Hatzfield v. Gulden*, 7 Watts, 152.

⁹ *St. Joseph, etc., R.R. Co. v. Ryan*, 11 Kansas, 602.

¹⁰ *Fuller v. Dame*, 18 Pick., 472; *Pacific R.R. Co. v. Seely*, 45 Mo., 212.

¹¹ *Maguire v. Smock*, 42 Ind., 1; *Howard v. First Independent Church of Baltimore*, 18 Md., 451. Agreements to pay money in aid of the erection of public buildings, on condition that they be erected at a certain place, or be not removed therefrom, have been sustained. *Carpenter v. Mather*, 3 Scam., 374; *State Treasurer v. Cross*, 9 Vt., 289; *Bull v. Talcot*, 2 Root, 119; *Comms. of Canal Fund v. Perry*, 5 Ohio, 56; *Caldwell v. Harrison*, 11 Ala., 755; *University of Vt. v. Buell*, 2 Vt., 48; *Religious Soc. v. Stone*, 7 Johns., 112; *M'Auley v. Billenger*, 20 Ib., 89; *Collier v. Baptist Education Soc.*, 8 B. Mon., 68; *Trustees of Amherst Academy v. Cows*, 6 Pick., 427; *Williams College v. Danforth*, 12 Pick., 541; *George v. Harris*, 4 N. H., 533; *Odineal v. Barry*, 24 Miss., 1; *State v. Johnson*, 52 Ind., 197; *contra*, *Comms. v. Jones*, Breese, 237; *Stilson v. Comms. of Lawrence Co.*, 52 Ind., 213.

not be enforced.¹ Contracts in restraint of marriage are void as being opposed to the general interests of society;² but not conditions annexed to gifts, legacies, and devises, in reasonable restraint of marriage.³ A wagering contract that the plaintiff would not marry within a given time, is *prima facie* in restraint of marriage, and void at common law.⁴ So, a marriage brokerage contract by which a party engages to reward another if he will negotiate an advantageous marriage for him is void,⁵ as is also on the same princi-

¹ Branch v. Tomlinson, 77 N. C., 388.

² Lowe v. Peers, 4 Burr, 2225; Baker v. White, 2 Vern., 215; Woodhouse v. Shepley, 2 Atk., 535; Cock v. Richards, 10 Ves., 429; Phillips v. Medbury, 7 Conn., 568; Conrad v. Williams, 6 Hill, 444; England v. Downs, 1 Beav., 96.

³ Story's Eq. Juris., Sec. 280. An injunction not to ask consent, is lawful, as not restraining marriage generally. A condition that a widow shall not marry, is not unlawful; nor an annuity during widowhood. A condition to marry, or not to marry, Titius, is good. And the same is true of a condition prescribing due ceremonies and a place of marriage. Still more, is a condition good, which only limits the time to twenty-one, or any other reasonable age, provided it be not used evasively to restrain marriage generally. Scott v. Tyler, 2 Bro. C. C., 488, per Lord Thurlow, Ch. Restraints upon marriage in respect to time, place, and person, to be valid, must be imposed with proper limitations. They may be so framed, as virtually to prohibit marriage. As, for instance, "a condition that a child should not marry until fifty years of age; or should not marry any person living in the same town, county, or State; or should not marry any person who was a clergyman, a physician, or a lawyer, or any person except of a particular trade or employment; for these would be deemed a mere evasion or fraud upon the law." Story's Eq. Juris., Sec. 283. "Courts of equity are not generally inclined to lend an indulgent consideration to conditions in restraint of marriage; and, on that account, they have not only constantly manifested an anxious desire to guard against any abuse to which the giving of one person any degree of control over another might eventually lead, but they have on many occasions resorted to subtleties and artificial distinctions, in order to escape the positive directions of the party imposing such conditions." Ib., Sec. 286.

⁴ Hartley v. Rice, 10 East., 22; Sterling v. Sinnickson, 2 South, 756; Eldred v. Mallory, 2 Col. T., 320; Young *ex parte*, 6 Biss., 53.

⁵ Roberts v. Roberts, 3 P. Wms., 74; Drury v. Hooke, 1 Vern., 412; Hall v. Potter, 3 Lev., 411; Cole v. Gibson, 1 Ves., 507; Smith v. Aykwell, 3 Atk., 566. "Marriage brokerage bonds which are not fraudulent on either party, are yet void, because they are a fraud on third persons, and are a public mischief, as they have a tendency to cause matrimony to be contracted on mistaken principles and without the advice of friends; and they are relieved against as a general mischief, for the sake of the public. Upon this principle, bargains to procure offices are rescinded, not on account of fraud on either of the parties, but for the sake of the public, because they tend to introduce unsuitable persons into public offices. Another case, where the deceit is upon persons not parties to the contract, is a deceit on a father, or other relation, to whom the affairs of an heir, or expectant, are not disclosed, so that they are influenced to leave their fortunes to be divided amongst a set of dangerous persons and common adventurers in fact, though not in form. This deceit is relieved against as a public mischief, destructive of all well-regulated authority or control of persons over their children, or others having expectations from them, and as encouraging extravagance,

ple, a bond given to another in consideration of his having assisted the obligor in an elopement and marriage without the consent of friends;¹ or an agreement providing for a contingent or future separation between husband and wife.² A parol contract concerning the purchase and conveyance of lands belonging to the United States, made in violation of the spirit of the laws of the United States, and in fraud of the same, cannot be enforced specifically or otherwise; and no trust estate in the lands will result in favor of the plaintiff which can be declared by a court of equity.³ The contracts of a public enemy are in general illegal, as being injurious to the public welfare, and incapable of being enforced either by him or by any person for his benefit.⁴

§ 214. *Immoral consideration.*—Contracts are illegal at common law the consideration of which is to do some immoral act, as future illicit cohabitation, or for the commission of crime, or the violation of law, or the omission of a

prodigality, and vice. A case in which an heir or expectant is frequently relieved against his contract, is a *post obit* bond. This is an agreement, on the receipt of a sum of money, by the obligor, to pay a larger sum exceeding the legal rate of interest, on the death of the person from whom he has some expectation, if the obligor be then living. The contract is not considered a nullity, but it may be made on reasonable terms in which the stipulated payment is not more than a just indemnity for the hazard. But whenever an advantage is taken of the necessity of the obligor, to induce him to make this contract, he is relieved, as against an unconscionable bargain, on payment of the principal and interest. Another case in which an heir is relieved, is when he is entitled to an estate in reversion or remainder expectant on the death of some ancestor or relative, and he contracts to sell the same for ready money. All these cases are not relieved against as fraudulent, because a reasonable and sufficient consideration may be paid, as ascertained by the annual value of the estate, and of the intervening life. But, as in *post obit* contracts, when an advantage is taken by the purchaser of the necessity of the seller, he will be relieved against the sale, on repaying the principal and interest, and sometimes paying for reasonable repairs made by the purchaser." Parsons, C. J., in *Boynton v. Hubbard*, 7 Mass., 112.

¹ *Williamson v. Gihon*, 2 Sch. & Lef., 356, 362.

² But not where an instrument provides for an immediate separation. *Jones v. Waite*, 7 Scott, 317. See *Moore v. Usher*, 7 Sim., 384; *Gibson v. Dickie*, 3 M. & S., 463.

³ *Brake v. Ballou*, 19 Kansas, 397. A contract for the purchase of land in contravention of the policy of a statute, will not be specifically enforced, notwithstanding the payment of the purchase money, possession under the contract, and the making of valuable improvements. *Smith v. Johnson*, 37 Ala., 633.

⁴ *Brandon v. Nesbitt*, 6 Term R., 23; *Albrecht v. Sussmann*, 2 V. & B., 323. See *Musson v. Fales*, 16 Mass., 334.

public duty thereafter to be performed ;¹ or a promise, not under seal, in consideration of past seduction or illicit intercourse ;² but not a specialty founded on such a consideration.³ Within the same rule, a contract for the printing or sale of a libelous or immoral book or picture, would be void.⁴

§ 215. *Agreements forbidden by statute.*—A contract founded on a transaction prohibited by law, is void.⁵ Some of the contracts which are illegal at common law, are also prohibited by statute. It was formerly considered that there was a difference between a deed or condition void in part by statute, and one void in part at common law, and that if any of several independent stipulations in an agreement were prohibited by statute, the whole contract was void. But such a distinction cannot be sustained on principle, and it is no longer regarded.⁶ Again, it was laid down in some of the older cases, that where the transaction in relation to which a contract was entered into was not expressly prohibited, but only forbidden under a penalty, the contract would nevertheless stand, payment of the penalty atoning for a violation of the statute.⁷ It is now, however, well settled that a penalty in a statute imports a prohibition, though there are no prohibitory words.⁸

¹ Walker v. Perkins, 3 Burr, 1568 ; 1 W. Blk., 517 ; Robinson v. Cox, 9 Mod., 263 ; Trovinger v. McBurney, 5 Cowen, 253. But not an agreement to indemnify an officer for previous neglect of duty. Hall v. Huntoon, 17 Vt., 244.

² Beaumont v. Reeve, 8 Q. B., 483. But see Binnington v. Wallis, 4 B. & Ald., 650, 652 ; Gibson v. Dickie, 3 M. & S., 463 ; Jennings v. Brown, 9 M. & W., 496.

³ Nye v. Moseley, 6 B. & C., 133 ; Knye v. Moore, 1 Sim. & Stu., 61. See Cusack v. White, 2 Const. Ct., 285 ; Shenk v. Mingle, 13 Serg. & Rawle, 29 ; Hall v. Palmer, 3 Hare, 532 ; Friend v. Harrison, 2 C. & P., 584.

⁴ Fores v. Johnes, 4 Esp., 97 ; Poplett v. Stockdale, R. & M., 337.

⁵ Tucker v. West, 29 Ark., 386.

⁶ Norton v. Simmes, Hob., 14 ; Morgan v. Horseman, 3 Taunt., 244 ; Maleverer v. Redshaw, 1 Mod., 35 ; Mosdel v. Middleton, 1 Vent., 237 ; Collins v. Blanter, 2 Wils., 351 ; Newman v. Newman, 4 M. & S., 70 ; Howe v. Synge, 15 East., 440 ; Doe v. Pitcher, 6 Taunt., 369 ; Biddell v. Leader, 1 B. & C., 327 ; Leavitt v. Blatchford, 5 Barb., 9.

⁷ Comyns v. Boyer, Cro. Eliz., 485 ; Gremare v. Le Clerc Bois Valon, 2 Camp., 144.

⁸ Bartlett v. Vinor, Carth., 252 ; Little v. Poole, 9 B. & C., 192 ; Cannan v. Bryce, 3 B. & Ald., 179 ; De Begnis v. Armistead, 10 Bing., 107 ; Foster v. Taylor, 5 B. & Ad., 896 ; Fergusson v. Norman, 6 Scott, 794 ; Mitchell v. Smith,

§ 216. *Contracts affected with usury.*—Agreements affected with usury cannot be specifically enforced.¹ A contract is usurious which reserves the principal with legal interest, and also a contingent benefit, without exposing the money loaned to risk.² It is unlawful for a lender of money to stipulate for advantages beyond the rate of interest allowed by law, and all stipulations for a collateral matter which may by possibility lead to a benefit, though not in themselves usurious, are illegal as tending to usury.³ If a lender file a bill in equity for the enforcement of a contract void by the statute against usury, the court will refuse all assistance and set aside any security and instrument infected with usury.⁴ So, a plaintiff who seeks the aid of a court of equity against an usurious contract, will not be relieved except upon the terms of paying to the defendant what is *bona fide* due him; and if the plaintiff do not offer to do so in his bill, the bill will be demurrable on that ground.⁵

§ 217. *Wagering and other illegal agreements.*—A wager has been defined to be “a contract in which the parties stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest except that arising from the possibility of such gain or loss.”⁶ Gaming and wagering contracts, though in general lawful at common law,⁷ are made illegal by statute; and a bill in equity will lie to have a gaming security delivered

4 Dall., 269; Pray v. Burbank, 10 N. H., 377; Sharp v. Teese, 4 Halst., 352; Seidenbender v. Charles, 4 Serg. & Rawle, 159; Harris v. Runnels, 12 How., 80; Coombs v. Emery, 14 Me., 404; Territt v. Bartlett, 21 Vt., 184; White v. Bass, 3 Cush., 449.

¹ Belcher v. Vardon, 2 Coll., 173; *post*, § 332.

² Barnard v. Young, 17 Ves., 44; Powney v. Blomberg, 14 Sim., 182.

³ Leith v. Irvine, 1 M. & K., 282.

⁴ 1 Fonbl. Eq., B. 1, Ch. 1, Sec. 3, *note* H; Scott v. Nesbit, 2 Bro. C. C., 641; Eagleson v. Shotwell, 1 Johns. Ch., 536; Fanning v. Dunham, 5 Ib., 122.

⁵ Story's Eq. Juris., Sec. 301; Benfield v. Solomons, 9 Ves., 84; Rogers v. Rathbun, 1 Johns. Ch., 367; Ballinger v. Edwards, 4 Ired. Eq., 449; Beard v. Bingham, 76 N. C., 285; *post*, § 332.

⁶ Hare, P. J., Fareira v. Gabell, 89 Pa. St., 90.

⁷ Chitty on Contr., 615.

up to be cancelled.¹ Where part of the consideration is money lost and won at gaming, the whole contract is void.² Equity will enjoin a judgment founded on a gaming debt, though the party has failed to defend himself at law, and gives no good reason for such failure.³ Contracts which tend to promote champerty and maintenance, are illegal at common law, and by statute.⁴ And the same is true of agreements to embarrass a prosecution for a criminal offence, by destroying or withholding evidence, or other acts of that character.⁵ In such cases, the parties take the responsibility of interfering with, and by secret or indirect means, frustrating the administration of justice. But an agreement to lay the whole facts before the court, and to leave it to the free exercise of the discretionary powers vested in it by law, is not in itself wrong, and is not rendered illegal even by a stipulation, on the part of a prosecutor, to exert such legitimate influence as his position gives him in favor of the extension of mercy to a guilty party.⁶ To avoid an obligation on the ground that it was

¹ Rawden v. Shadwell, Ambler, 269; Woodroffe v. Farnham, 2 Vern., 291; Osbaldiston v. Simpson, 13 Sim., 513; Hasket v. Wootan, 1 Nott & McCord, 180; Wood v. Wood, 2 Murphy, 172; Forrest v. Hunt, 1b., 458; Martin v. Terrell, 12 Sm. & Marsh, 571; *contra*, Cowles v. Raguett, 14 Ohio, 55.

² Reed v. Reeve, 13 Bush. Ky., 447.

³ Woodson v. Barrett, 2 Hen. & Munf., 80; Skipwith v. Strother, 3 Rand., 214; Hoopes v. Smock, 1 Wash., 391; Dade v. Madison, 5 Leigh., 401.

⁴ Powler v. Knowler, 2 Atk., 224. ⁵ Kimbrough v. Lane, 11 Bush. Ky., 550.

⁶ Nickleson v. Wilson, 60 N. Y., 362, reversing S. C., 1 Hun., 615; 4 Thomp. & Cook, 104. In Pollak v. Gregory, 9 Bosw., 116, it was held that an agreement to pay a witness for testifying, on condition that his evidence should lead to a result favorable to the party calling him, was illegal and void. "But the evil of such an agreement consists in the condition which holds out to the witness the temptation of falsifying his testimony, so as to produce the result upon which his compensation is to depend. Where the witness simply consents to make a disclosure of the truth, and he has no inducement to produce any special result, the mischief is not apparent. In Yeatman v. Dempsey, 7 C. B. N. S., 628, an agreement to testify, divested of such a condition, was sustained; and also in Webb v. Page, 1 Carr. & Kir., 23, in the case of an expert." Rapallo, J., in Nickleson v. Wilson, *supra*. This case was as follows: An indictment had been found against A. and B., for obtaining, by false pretences, the notes of C., in the sum of six thousand dollars; and an action had also been brought against them by C. to recover the amount of the notes. B. afterward commenced proceedings in bankruptcy against C., and evidence was taken therein. A. and C. directed their respective counsel to make any agreement they

given for compounding a felony, it must appear that the compounding of the felony was the consideration of the obligation. Where the consideration of a mortgage is a *bona fide* debt, and it was the duty of the debtor under the circumstances to pay or secure the debt, a threat of a criminal prosecution unless the mortgage is given, does not compound the offence.¹

deemed for the interest of their clients in the pending prosecution; and C.'s counsel, who was the district attorney, agreed with the counsel of A. that A. should testify to all he knew, in the several proceedings, and if a verdict was not rendered against B. in the civil action, none should be obtained against A.; that if judgment were obtained against A. and B., it should only be enforced against A. to the extent of one thousand dollars, and be paid in one of C.'s notes; that A. should have control of the judgment against B. for whatever sum he was obliged to account for to C.; and that, if A. testified fully, the district attorney would recommend that a *nolle prosequi* be entered in his behalf. All of the foregoing details were not communicated to A. and C.; but A., acting under the instructions of his counsel, fulfilled the agreement on his part. In a suit for specific performance brought by A., the complaint having been dismissed in the court below, on the ground that the agreement was against public policy, and void, this judgment was reversed by the court of appeals, and a new trial ordered.

¹ *Plant v. Gunn*, 2 Woods, 372. It is no defence to an action brought to recover the price of goods sold, that the vendor knew that they were bought for an illegal purpose, provided it is not made a part of the contract that they shall be used for that purpose; and provided also, the vendor has done nothing in aid or furtherance of the unlawful design. *Holman v. Johnson*, Cowp., 341; *Faikney v. Reynous*, 4 Burr., 2069; *Pellecat v. Angell*, 2 C. M. & R., 311; *Hodgson v. Temple*, 5 Taunt., 181; *Merchant's Bank v. Spalding*, 12 Barb., 302; *Armstrong v. Toler*, 11 Wheat., 258; *Tracy v. Talmage*, 14 N. Y., 162; *McKinney v. Andrews*, 41 Texas, 363. *Contra*, *Langton v. Hughes*, 1 Maule & Sel., 593. The case of *De Groot v. Vanduzer*, 20 Wend., 390, before the New York court for the correction of errors, was decided upon the principle that where the intention of one of the parties to the contract is to enable the other party to violate the law of the State, the contract is void; and that no action can be sustained by either party founded on such a contract. "There are undoubtedly many conflicting decisions upon the question how far the vendor of an article is chargeable with a participation in the illegal purpose for which it is intended to be used, from a mere knowledge of the fact that the purchaser intends so to use it. The case of the druggist who sold drugs to a brewer, knowing that he intended to use them in brewing, contrary to the statute, is a very strong case in favor of extending the principle to a collateral contract which had no necessary connection with the violation of the law. That case shows, too, that where the agreement is made for the purpose of aiding the violation of the law, it is not necessary to aver and prove that the offence was in fact consummated by an actual violation subsequent to the agreement, which agreement is void from the beginning. *Langton v. Hughes*, 1 Maule & Sel., 593. If a trader agrees to furnish a robber with arms and ammunition for the purpose of carrying on his business of highwayman, it cannot be a valid answer to the illegality of the contract, that the arms and ammunition sold to him for that purpose, were not in fact used in the prosecution of the illegal object originally intended at the time of the purchase. The illegality of the contract consists in the intention to aid in a violation of the law, or of a principle of public policy, or to commit a breach of good morals, and not in the

§ 218. *Where the parties sustain fiduciary relations toward each other.*—Contracts not strictly illegal may, under the circumstances, be regarded with suspicion by the court, and be deemed unlawful as opposed to general public policy, in consequence of the peculiar relation sustained by the parties toward each other, affording a temptation and an opportunity for unconscionable advantage. Of this nature are contracts between parent and child, attorney and client, physician and patient, guardian and ward, trustee and *cestui que trust*, and principal and agent or surety. This class of cases forms an exception to the rule, previously adverted to, that the defence of illegality is not allowed out of concern for the individual interests of the party interposing it; one of the grounds of the jurisdiction being the protection of persons against the effects of overweening confidence and precipitate judgment.¹ A court of

actual consummation of the offence. These cases in which an independent contract has been held void from a mere knowledge of the fact of the illegal end in view, proceed upon the ground that the party having such knowledge, intended to aid the illegal object at the time he made the contract; and whenever, therefore, that intention is shown, no doubt can exist as to the propriety of applying the rule that no action or claim can be sustained in a court of justice founded upon such contract." *Ib.*, per Walworth, Ch.

¹ *Goddard v. Carlisle*, 9 Price, 169; *Fox v. Mackreth*, 2 Bro. C. C., 407; *Baker v. Bradley*, 35 Eng. L. & Eq., 449; *Walmesley v. Booth*, 2 Atk., 25; *Edwards v. Meyrick*, 2 Hare, 60; *Billing v. Southee*, 10 Eng. L. & Eq., 37; *Dent v. Bennett*, 4 M. & C., 269; *Dawson v. Massey*, 1 B. & B., 226; *Hylton v. Hylton*, 2 Ves., 548; *Hatch v. Hatch*, 9 *Ib.*, 292; *Cecil v. Plaistow*, 1 Anst., 202; *Taylor v. Taylor*, 8 How., 200; *Jenkins v. Pye*, 12 Pet., 241; *Slocum v. Marshall*, 2 Wash. C. C., 397; *Whelan v. Whelan*, 3 Cowen, 537; *Boney v. Holingsworth*, 23 Ala., 698; *Sears v. Shafer*, 2 Seld., 268; *Hewitt v. Crane*, 2 Halst. Ch., 159; *Howell v. Ransom*, 11 Paige Ch., 538; *Evans v. Ellis*, 5 Denio, 640; *Voorhees v. Presbyterian Church*, 8 Barb., 136; *Blackmore v. Shelby*, 8 Humph., 439; *Dobson v. Racey*, 3 Sandf., 61; *Pratt v. Thornton*, 28 Me., 335; *Van Epps v. Van Epps*, 9 Paige Ch., 2c7; *Farnam v. Brooks*, 9 Pick., 212; *King v. Baldwin*, 2 Johns. Ch., 554; *Bank of U. S. v. Etting*, 11 Wheat., 59. "The principle which affects dealings between trustee and *cestui que trust*, is not confined to trustees properly so called, but extends to other persons invested with a like fiduciary character: such as executors and administrators, assignees of a bankrupt, commissioners of bankrupts, and other judicial officers; committees of lunatics, governors of a charity, receivers, directors of a railway or other company, arbitrators, a member of a corporation taking a lease of the corporate property, and many other cases. The disability extends in general to all persons who, being employed or concerned in the affairs of another, acquire a knowledge of his property. Partners in business of an assignee in bankruptcy are equally disqualified from purchasing as the assignee himself." *Kerr on Fraud and Mistake*, 161, 162.

equity will closely scrutinize a transaction where fiduciary and confidential relations exist between the parties, and will refuse to decree the specific performance of a contract entered into for the plaintiff's own benefit when there is reason to suppose that advantage was taken by him of the defendant's situation to obtain an improper advantage.¹ Persons stand in some sort under the protection of the law, who, from their youth, advanced age, or character, are presumed to be incapable of taking care of their own interests. "Contracts of seamen respecting their wages are watched with great jealousy, and are generally relievable whenever any inequality appears in the bargain, or any undue advantage has been taken."² On the same principle, persons dealing with heirs, reversioners, and expectants, during the life of their parents or other ancestors, are required to show that a fair and adequate consideration has been paid.³ Although courts view with jealousy and suspicion any dealing between a mortgagor and mortgagee to extinguish the equity of redemption, yet if a fresh contract be made between them by which the mortgagee acquires an absolute ownership by purchase, and the transaction is fair and honest, the purchaser will not be disturbed.⁴

¹ *Flanagan v. Gt. Western R.R. Co.*, L. R. 7, Eq. 116.

² 1 Story's Eq. Juris., Sec. 132.

³ *Ante*, § 178.

⁴ *Remsen v. Hay*, 2 Edw. Ch., 535; *Wilson v. Carpenter*, 62 Ind., 495.

CHAPTER VIII.

CONTRACT ULTRA VIRES.

- 219. Nature of defence.
- 220. Construction and extent of powers of corporations.
- 221. Distinction between purpose not authorized, and unauthorized means of effecting an authorized purpose.
- 222. Power of corporation presumed.
- 223. Unauthorized contract of corporation incapable of enforcement.
- 224. Contracts of corporations impliedly prohibited.
- 225. Contract of corporation *ultra vires* as to stockholders, not necessarily so as to other party.
- 226. Effect of performance of contract.
- 227. Recovery of consideration paid.

§ 219. *Meaning and application of defence.*—The defence now to be considered relates exclusively to suits brought to enforce contracts entered into by corporations, which, being artificial bodies created by statute, can make no valid contract not within the powers conferred upon them. Strictly speaking, an act is *ultra vires* when its performance by the corporation is not authorized under any circumstances or for any purpose. But the term is sometimes also used in a more limited sense; that is, with reference to the rights of certain parties, when the corporation is not entitled to perform the act without their consent; or with reference to a particular purpose when it cannot rightfully perform the act for that purpose, although it might do so for some other purpose.¹ The defence may be ap-

¹ *Miner's Ditch Co. v. Zellenbach*, 37 Cal., 543. "The rights of strangers dealing with corporations may vary according as the act is *ultra vires* in one or the other of these senses. When an act is *ultra vires* in the first sense mentioned, it is generally, if not always, void *in toto*, and the corporation may avail itself of the plea. But when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case. In the former case, the defence of *ultra vires* is available to the corporation as against all persons, because they are bound to know, from the law of its existence, that it has no power to perform the act. But in the latter case, the defence may or may not be available, depending upon the ques-

plicable to a contract which in itself would be unobjectionable were the corporation authorized to enter into such an engagement. "When acts of a corporation are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation cannot perform; but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board, by the shareholders, that the affairs shall be managed and the funds applied solely for the carrying out of the objects for which the corporation was created."¹ The objection that the contract is *ultra vires* may be taken in suits against, as well as in those brought by, corporations. This necessarily follows, a void contract being incapable of enforcement by either party; and if the corporation were estopped from denying its power, the estoppel would operate with like effect upon those who contracted with it, and the result would be that practically the corporation would be without limitation as to its powers.² The distinction between private individuals and corporations is, that while the former may make any contract not prohibited by law, or against public policy, the latter can exercise no powers not conferred on them by their charters.³

tion whether the party dealing with the corporation is aware of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance. And the test, as between strangers having no knowledge of an unlawful purpose and the corporation, is to compare the terms of the contract with the provisions of the law from which the corporation derives its powers; and if the court can see that the act to be performed is necessarily beyond the powers of the corporation for any purpose, the contract cannot be enforced, otherwise it can." *Ib.*, per Sawyer, C. J.

¹ Allen, J., in *Whitney Arms Co. v. Barlow*, 63 N. Y., 62.

² *Pennsylv., etc., Steam Navigation Co. v. Dandridge*, 8 Gill & Johns., 248. Although corporations are in general bound by their contracts under seal the same as individuals, yet when a corporation is created for a special purpose with limited powers, the contract does not bind it if it appear from the express provisions of the act creating the corporation, or by reasonable inference, that the contract was *ultra vires*. *South Yorkshire, etc., Co. v. Gt. Northern R.R. Co.*, 9 Exch., 55, 84; *Mayor, etc., of Norwich v. Norfolk R.R. Co.*, 4 Ell. & Bl., 397.

³ *Head v. Providence Ins. Co.*, 2 Cranch, 127; *Bank of U. S. v. Danbridge*, 12 Wheat., 64; *Han. & St. Jos. R.R. Co. v. Marion*, 36 Mo., 294; *Mathews v. Skinker*, 62 *Ib.*, 329; *Nat. Bank v. Taylor*, 56 Pa. St., 15.

§ 220. *Construction and scope of corporate powers.*—With reference to the powers and capacities of corporations, their charter must, like every other statute, be construed as an entirety.¹ In determining whether a given act is within it, the general purpose for which the corporation was formed must be considered, and such reasonable construction be given to the terms employed as will tend to promote such purpose.² A corporation is not limited to the powers specifically granted, but possesses in addition all such powers as are necessarily incident to those specified, or essential to the purposes and objects of the corporate existence.³ A municipal corporation therefore may, at common law, unless restrained by some statute, purchase and hold all such real estate as may be necessary to the proper exercise of any power specifically conferred, or essential to the purposes of municipal government for which it was created.⁴ And a railroad company may, without any special authorization, contract for the purchase of land for the purpose of enlarging a terminus.⁵ So, if the charter of a railroad company empowers them to contract for the transportation and delivery of persons and property over its road at any place beyond the termini of the road, the company may purchase a steamboat to carry freight and passengers from the terminus of their road to the line of another; and a note given by the company for such boat will be binding upon them.⁶ But the rule requiring corporations to keep within the limits of their powers will be enforced more strictly in the case of municipal corporations

¹ *White's Bank v. Toledo Ins. Co.*, 12 Ohio St., 601; *Talmadge v. North Am. Coal & Transportation Co.*, 3 Head Tenn., 337.

² *Vandall v. South San Francisco Dock Co.*, 40 Cal., 83.

³ *Bank of Augusta v. Earle*, 13 Peters, 519; *Whitman Mining Co. v. Baker*, 3 Nevada, 386; *Coleman v. Eastern Counties R.R. Co.*, 10 Beav., 17.

⁴ *Ketchum v. City of Buffalo*, 14 N. Y., 356; *Le Couteux v. City of Buffalo*, 33 Ib., 333.

⁵ *Mayor of Norwich v. Norfolk R.R. Co.*, *supra*.

⁶ *Shawmut Bank v. Plattsburgh & Montreal R.R. Co.*, 31 Vt., 491. And see *White's Bank v. Toledo Ins. Co.*, *supra*.

than in other cases, for reasons which are obvious. The charters of such bodies are public laws; the city ordinances are published before taking effect; and the business is publicly conducted. All persons can inform themselves of the powers of a municipal corporation, and of the manner in which such powers are to be exercised; and if they propose to contract with it, they are bound to inform themselves at their peril.¹

§ 221. *Latitude allowed as to mode of effecting lawful object.*—A distinction has been made between a purpose not authorized by the act of incorporation, and unauthorized means of effectuating the authorized purpose; the corporation having power to vary the mode by which the given purpose is to be attained, though any attempt to carry into effect a foreign purpose would be void. A railroad company, for instance, authorized to construct a line from A. to B., could not, instead of doing that, lay one from C. to D. But if part of the originally designed route is found impracticable or difficult, the company may lawfully enter into contracts to effect a deviation.² And where the charter of a corporation prescribes what species of security shall be taken by its officers or agents, a different sort of security from that

¹ *City of Leavenworth v. Rankin*, 2 Kansas, 357, per Crozier, C. J. Persons dealing with the officers and agents of municipal and other public corporations "are chargeable with notice of the powers which the corporation possess, and are to be held responsible accordingly." *Thomas v. City of Richmond*, 12 Wall, 349, per Bradley, J.

² *Eastern Counties R.R. Co. v. Hawkes*, 5 House of Lds., 372. In another case, a railroad company, being authorized by statute to construct their road between specified termini crossing a certain river, encountered obstacles in effecting their crossing there, and, with the assent of the admiralty and the proprietors, they made a pier in another part of the river, in order to carry the railroad across at that place. The company having been indicted for a nuisance, it was agreed by way of compromise, that they should complete the works within a year in a manner stipulated, so as to protect the navigation, and that, in default thereof, the company should pay one thousand pounds as liquidated damages. In a suit on a deed containing a covenant to this effect, the court differed in opinion as to the rights of the plaintiff. Lord Campbell held that the covenant was bad, as being for the application of the funds to a purpose other than that for which the company was established. Earle, J., and Coleridge, J., considered the covenant good, on the ground that it was simply a change of the means and mode by and through which the same purpose was to be effected. *Mayor of Norwich v. Norfolk R.R. Co.*, 4 Ell. & Bl., 397.

prescribed may be enforced against the person who gave it.¹ So, where a provision in the charter is designed to protect the corporation, the corporation may waive the provision; and this may be proved to have been done, by a repetition of acts of a like or similar character.²

§ 222. *Legality of transaction presumed.*—The contract of a corporation is *prima facie* valid, and the burden of proof is on the party objecting to it to show that it is in excess of the company's powers.³ Therefore, "the dealings of a corporation which, on their face, or according to their apparent import, are within its charter, are not to be regarded as illegal or unauthorized, without some evidence tending to show that they are of such a character. In the absence of proof, there is no legal presumption that the law has been violated. On the contrary, these artificial bodies, like natural persons, are entitled to the benefit of the rule which imputes innocence, rather than wrong, to the conduct of men. A different doctrine would require a corporation, even in many of its ordinary transactions, to show that it had not transcended the limits of its charter."⁴ Acts of a corporation which cannot be legally accounted for except on the supposition of other acts done to make them legally operative and binding, are presumptive proofs of such other acts.⁵ But unless the powers of a corporation, which are claimed to be implied, are directly and immediately appro-

¹ Bank of South Carolina v. Hammond, 1 Rich., 281; Mott v. U. S. Trust Co., 19 Barb., 568; U. S. Trust Co. v. Brady, 20 Ib., 119; Littlewort v. Davis, 50 Miss., 403. But see Spedon v. Mayor, etc., of N. Y., 7 Bosw., 601; 21 How. Pr., 395.

² Hood v. N. Y. & N. H. R.R. Co., 22 Conn., 502.

³ Shrewsbury & Birmingham R.R. Co. v. Northwestern R.R. Co., 6 House of Lds., 135, 136.

⁴ Chautauque County Bank v. Risley, 19 N. Y., 369, per Coimstock, J.; Farmer's Loan and Trust Co. v. Clowes, 3 Ib., 470; De Groff v. American, etc., Co., 21 Ib., 124; Yates v. De Bogert, 56 Ib., 526; Farmer's Loan and Trust Co. v. Perry, 3 Sandf. Ch., 339; Peru Iron Co. *ex parte*, 7 Cowen, 540; Safford v. Wyckoff, 4 Hill, 442; Morris & Essex R.R. Co. v. Sussex R.R. Co., 20 N. J. Eq., 542; Charleston & Jeffersonville Turnpike Co. v. Willey, 16 Ind., 34; Dana v. Bank of St. Paul, 4 Minn., 385; Mitchell v. Rome R.R. Co., 17 Ga., 574; Oxford Iron Co. v. Spradley, 46 Ala., 98.

⁵ Soc. of Middlesex v. Davis, 3 Metc., 133.

priated to the execution of the specific powers, and are a useful and necessary means to give them effect, such implied powers cannot be regarded as within the scope of the grant.¹ "An incidental power is one that is directly and immediately appropriate to the execution of the power granted, and not one that has a slight or remote relation to it."²

§ 223. *Unauthorized transaction*.—A contract which the corporation had no authority to make, will be void, and incapable of enforcement, either at law or in equity.³ Where a bank bought land for the purpose of selling it, and filed a bill for specific performance, it was held a good defence that the bank was authorized to hold such real estate only as it needed in the transaction of its business, or such as had been mortgaged to it as security, or conveyed to it in satisfaction of debts, or purchased at sales upon judgments obtained for such debts.⁴ Such a ground of defence on the

¹ Curtis v. Leavitt, 13 N. Y., 157, 158.

² Hood v. N. Y. & N. H. R.R. Co., 22 Conn., 1; People v. Utica Ins. Co., 15 Johns., 358; N. Y. Firemen's Ins. Co. v. Sturges, 2 Cowen, 664; Same v. Ely, Ib., 678; Broughton v. Manchester Water Works, 3 Barn. & Ald., 9; People v. Trustees of Geneva College, 5 Wend., 217; Trustees v. Peaslee, 15 N. H., 317; Downing v. Mt. Washington R.R. Co., 40 Ib., 230; Fuller v. Trustees of Plainfield School, 6 Conn., 532; Com. v. Erie & Northeast R.R. Co., 27 Pa. St., 339; Dartmouth College v. Woodward, 4 Wheat., 518; Pacific R.R. Co. v. Seely, 45 Mo., 212; Town of Petersburg v. Metzker, 21 Ill., 205. But see Hart v. The Rensselaer & Saratoga R.R. Co., 8 N. Y., 37; Quimby v. Vanderbilt, 17 Ib., 306; Bissell v. Mich. Southern & Northern Ind. R.R. Co., 22 Ib., 258; Buffett v. Troy & Boston R.R. Co., 40 Ib., 168.

³ Mu. Life & Fire Ins. Co. v. McKelway, 1 Beasley's Ch., 133; Pennsylv., etc., Co. v. Dandridge, 8 Gill & Johns., 248; Pearce v. Madison & Indianapolis R.R. Co., 21 How., 441; Haynes v. Covington, 13 Sm. & Marsh, 411; Little v. O'Brien, 9 Mass., 423; Commercial Bank v. Nolan, 7 How. Miss., 508; Littlewort v. Davis, 50 Miss., 403. If a corporation, authorized to construct a railroad, by the non-performance of the conditions of its charter has forfeited or lost its corporate rights and powers, that fact may be asserted by any one whose lands or property are sought to be appropriated to the uses of the corporation under the laws authorizing the taking of private property for public use. Matter of Brooklyn, etc., R.R. Co., 72 N. Y., 245. There may be a good defence to a suit for the specific performance of an executory contract, when a bill could not be maintained to set aside the same contract.

⁴ Bank of Michigan v. Niles, 1 Doug., 401; Affg. S. C., 1 Walker Mich., 99. But see the Banks v. Poitiaux, 3 Rand Va., 136. Where a corporation is created by statute "for particular purposes, their deed, though under their corporate seal, regularly affixed, does not bind them, if it appears by the express provisions of the statute creating them, or by necessary or reasonable inference from its enactments, that the deed is *ultra vires*, that is, that the Legislature meant that such a deed should not be made." South Yorkshire R.R. & River Dun Co. v.

part of a corporation, although it may be "unbecoming and ungracious," is nevertheless valid when it is made to appear either by the express provisions of the act of incorporation, or by necessary and reasonable implication therefrom, that the contract which is sought to be enforced is beyond the scope of the powers granted by its charter.¹

§ 224. *Engagements impliedly forbidden.*—With reference to such contracts as a corporation is impliedly prohibited from entering into, it is obvious that any intentional use by the corporation of its powers to defeat the objects of its creation, must be prohibited by implication.² So, it cannot lawfully engage in objects foreign to the purposes of its incorporation, notwithstanding such objects may be profitable to the company, and be approved by the shareholders. A railroad company is bound to apply all of its funds for the purposes provided in its charter, and for no other. Thus, in an action by a railroad company against another similar company, on a covenant by the defendants to pay to the plaintiffs the costs incurred in an application to Parliament by the plaintiffs at the instance of the defendants for obtaining powers which the defendants thought it for their interest the plaintiffs should possess, it was held that there could be no recovery.³

Gt. Northern R.R. Co., 9 Exch., 84, per Lord Wensleydale. A corporation contracted for the purchase of certain property, without legal power to do so. Afterward, authority was obtained and measures taken by the corporation under the act to fulfil its agreement, but it ultimately refused to complete the purchase on the ground that the contract was not under the corporate seal nor signed by two directors. The vendor having brought a suit for specific performance, the bill was dismissed for the reason that the contract was originally *ultra vires*, not being made dependent upon obtaining the consent of the Legislature. *Leominster Canal Co. v. Shrewsbury & Hereford R.R. Co.*, 3 K. & J., 654.

¹ *Brown v. Winnismet Co.*, 11 Allen, 326.

² *Mayor of Norwich v. Norfolk R.R. Co.*, 4 Ell. & Bl., 397.

³ *East Anglican R.R. Co. v. Eastern Counties R.R. Co.*, 11 C. B., 775; S. C., 7 Rail. Cas., 150. And see to the same effect, *MacGregor v. The Official Manager of the Dover & Deal R.R. Co.*, 18 Q. B., 618; S. C., 7 Rail. Cas., 227; *Gage v. Newmarket R.R. Co.*, 18 Q. B., 457; *Eastern Counties R.R. Co. v. Hawkes*, 5 House of Lds., 347; *Bostock v. North Staffordshire R.R. Co.*, 4 Ell. & Bl., 798. Two railroad companies, A. and B., entered into a contract by which it was agreed that the B. company should pay to the A. company seven-thirteenths of the profits of the carriage of passengers and goods over a part of the B. company's line, in consideration of receiving in return six-thirteenths of the profits

§ 225. *How far individual contracting with corporation protected.*—Notwithstanding the contract be *ultra vires* as respects the stockholders, it does not necessarily

made by the A company on a certain portion of their line. This agreement gave rise to protracted litigation, in which eminent English judges delivered opposing opinions; Lord Cottenham and the Queen's Bench inclining to the view that it was valid, and Lord Justice Turner and Lord Cranworth, sitting in the House of Lords, strongly leaning to the opinion that it was in excess of the powers of the companies. It was urged that if such an agreement was valid as to part of the line, why was it not valid as to the whole? And if so, there would be nothing to prevent two companies from placing their funds in a common stock, and dividing them among their stockholders in any stipulated proportion. *Shrewsbury & Birmingham R.R. Co. v. London & Northwestern R.R. Co.*, 2 M'N & G., 324; 3 Ib., 70; 17 Q. B., 652; 16 Beav., 44; 4 De G. M. & G., 115; 6 House of Lds., 113. And see *Lancaster & Carlisle R.R. Co. v. Northwestern R.R. Co.*, 2 K. & J., 293. In another case between two railroad companies, the plaintiffs sued on a deed which was given under an agreement of the companies by which the defendants were to use the line of the other company for the transportation of coal from the field intersected by it, and thence on to their own line, on payment to the plaintiffs of sums which, with the profits of the company, should enable them to pay their proprietors dividends varying according to the quantity of coal carried by the defendants over their line. The argument turned on the effect of a statute (railway clauses consolidation act, 1845, Sect. 87), by which railway companies are permitted to contract with one another for the passage over their lines of wagons, upon the payment of such tolls, and under such conditions, as may be agreed on. The judges were divided in opinion, Martin, B., deciding that the contract was *ultra vires*, while Platt, B., and Lord Wesleydale, held the contrary. The last named thought it far from clear that the statutory powers of the company restrained them from entering into such a contract as that sued on, and that as the contract was *prima facie* valid, and it had not been shown that the statute prohibited such a bargain, the agreement must be enforced. This decision was affirmed in the exchequer chamber. *South Yorkshire R.R. and River Dun Co. v. Gt. Northern R.R. Co.*, 9 Ex., 55, 643. How far individuals interested in a public improvement may lawfully contract with a municipal corporation to pay the expense of the same, does not seem to have been fully settled. There are grave objections to such engagements, and it seems to us that it would be safer, as a rule, to discountenance them. The following cases may be considered: *Patchin v. Doolittle*, 3 Vt., 457; *Com. v. Inhabs. of Cambridge*, 7 Mass., 158; *Parks v. Boston*, 8 Pick., 218; *Dudley v. Cilley*, 5 N. H., 558; *Goodwin v. Milton*, Ib., 458; *Third Turnpike Co. v. Champney*, 2 Ib., 199; *Knowles' petition*, 22 Ib., 361; *Dudley v. Butler*, 10 Ib., 281; *Guernsey v. Edwards*, 26 Ib., 224. Where the improvement of the surface of a street was a mere act of ordinary repair, not requiring any new location or change of grade, and a row of shade trees was left in the middle of the highway, and granite curb-stones placed around them by the city, at the request of abutters on the street, in consideration of their promise to pay the expense of such curb-stones opposite their lands, it was held that such an agreement was not illegal. *Springfield v. Harris*, 107 Mass., 532. A street in a city had for many years been dedicated to the public use, but had not been defined and recorded. One of the parties who united in the act of dedication, claimed that a narrow strip near the middle of the road had not been surrendered to the public. The defendants, wishing to have this impediment removed, and the street accepted and recorded, applied to the city to have it done, agreeing to pay the damages. Held, that such agreement was not illegal. *Townsend v. Hoyle*, 20 Conn., 1. Storrs, J., dissenting, contended that the undertaking of the defendants was without consideration, and opposed to public policy. Ellsworth, J., who delivered the opinion of the court,

follow that it is also bad in relation to another party.¹ To affect the latter, he must have known at the time of the contract, that it was intended for a purpose foreign to the incorporation of the company.² When, however, the nature of the contract is such as to show that it is in excess of the powers of the company, both of the parties will be presumed to have had this knowledge, and the contract be deemed void. But such a defence would not be permitted to prevail against a party who could not be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract, it had virtually

said: "We must not be considered as assenting to the proposition, that a promise by individuals to pay a part of the expenses of public improvements ordered by public authority, is, of course, illegal and void. We think the amount of a public burthen, or the cost to the public of an improvement, may properly enough enter into the question of expediency or necessity. A canal, a railroad, a bridge, a new street, a public square, a sewer, is called for. If made in one way, or in one place, it will be much better for the public, though more expensive. But individuals especially benefited, stand ready, by giving their land, their money, or their labor, to meet the extra expense. Will these promises be void, as being without consideration or against public policy? We think not."

¹ The following are some of the cases which have been deemed as between stockholders and directors to be transactions beyond the scope of the corporation: The application by a railroad company of a portion of its resources in obtaining the passage of a bill to improve the navigation of a river. *Munt v. Shrewsbury & Chester R.R. Co.*, 13 Beav., 1; in promoting a branch line. *Gt. Western R.R. Co. v. Rushout*, 5 De G. & Sm., 290; or in making a part only of the line after the rest was abandoned. *Cohen v. Wilkinson*, 5 Rail. Cas., 741. And see *Bagshawe v. Eastern Counties R.R. Co.*, 6 Rail. Cas., 152; *S. C.*, 2 M'N. & G., 289; *Beman v. Rufford*, 7 Rail. Cas., 48, 75; *S. C.*, 1 *Simp. N. S.*, 550. So, a company was restrained from purchasing shares in another company. *Solomon v. Laing*, 12 Beav., 339. So, a railroad company was enjoined from applying any of its funds in aiding a company in establishing steam communication between certain seaports, which the directors of the railroad company believed would increase their traffic, and thus promote their interests. *Coleman v. Eastern Counties R.R. Co.*, 10 Beav., 1; *S. C.*, 4 Rail. Cas., 513. Although a corporation will be restrained from expending its funds in applying to the Legislature for a bill outside the purposes of its creation. *Atty. Gen. v. Corp. of Norwich*, 16 *Sim.*, 225; *Simpson v. Denison*, 10 *Hare*, 51; yet, this will not be done, when the proceedings are taken, not to extend the powers of the corporation, but to defend its existing rights. *Bright v. North*, 2 *Phil.*, 216.

² *Osipee Manf. Co. v. Canney*, 54 *N. H.*, 295.

affirmed.¹ In one case, Lord St. Leonards said that he felt disposed "to restrain the doctrine of *ultra vires* to clear cases of excess of power with the knowledge of the other party, express, or implied from the nature of the corporation and of the contract entered into."² Where a corporation is authorized to take land for its use, one who contracts to sell his land to it, is not required to ascertain whether or not the land is strictly needed by the company for such use. Although the land be not so needed, and the funds of the company are misapplied by its purchase, yet if the vendor acted in good faith, and without knowledge of the misapplication, the contract may be enforced by him in equity.³ The same principle applies where the company purchases more land than is required.⁴ The defence "would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable, not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable."⁵

§ 226. *Where the plaintiff has fully performed.*—"The executed dealings of corporations must be allowed to stand for and against both parties, where the plainest rules of good faith require."⁶ It is now settled that a

¹ Bissell v. Mich. Southern & Northern Ind. R.R. Co., 22 N. Y., 258; Monument National Bank v. Globe Works, 101 Mass., 57.

² Eastern Counties R.R. Co. v. Hawkes, 5 House of Lds., 331.

³ Ibid.

⁴ Ibid.

⁵ Selden, J., in Bissell v. Mich. Southern and Northern Ind. R.R. Co., *supra*; Marsh v. Fulton County, 10 Wall, 676.

⁶ Parish v. Wheeler, 22 N. Y., 494, per Comstock, Ch. J. And see Silver Lake

corporation cannot avail itself of the defence of *ultra vires*, when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance, and of the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief, or an action in some other form will prevail. So, if the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation; the ground of defence of an individual sued upon a contract with a corporation being that the obligation is not mutual, as the corporation would not be bound by it.¹ In the case last cited, Tindal, Ch. J., said: "The defendants having had the benefit of the performance by the corporation of the several stipulations into which they entered, have received the consideration for their own promises. Such promise by them is therefore not *nudum pactum*. They never can want to sue the corporation upon the contract in order to enforce the performance of their stipulations which have been already voluntarily performed, and therefore no sound reason can be suggested why they should justify their refusal to perform the stipulations made by them on the ground of inability of the corporation, which suit they can never want to sustain." Where a municipal corporation issued and circulated notes, the value of which was received and enjoyed by the corporators in the erection of improvements in the city, it was held that the corporation was liable therefor, although it was not authorized by its charter to issue the notes.² A person who

Bank v. North, 4 Johns. Ch., 370; Palmer v. Lawrence, 3 Sandf., 161; State of Indiana v. Woram, 6 Hill, 37; Chester Glass Co. v. Dewey, 16 Mass., 94; Steamboat Co. v. McCutcheon, 13 Pa. St., 13; Steam Navigation Co. v. Weed, 17 Barb., 378.

¹ Whitney Arms Co. v. Barlow, 63 N. Y., 62; Chippendale, *ex parte*, 4 De G. M. & G., 19; *In re* National P. B. Building Soc., L. R. 5, Ch. 309; *In re* Cork, etc., R. C., 4 Ib., 748; Fishmonger's Co. v. Robertson, 5 Mc. & G., 131.

² Allegheny City v. McClurkan, 14 Pa. St., 81. While courts are inclined to maintain with vigor the limitations of corporate action whenever it is a question

has sold real estate to a bank which has no right to transact business until the charter creating it has been approved by Congress, cannot question the capacity of the bank to take the title after it has paid the consideration for the purchase, there being no judgment of ouster against the bank at the instance of the government.¹

§ 227. *Compelling repayment.*—When a contract with a corporation is void, and the other party cannot, for that reason, maintain an action on it, he may recover the compensation paid, the parties not being *in pari delicto*.²

of restraining the corporations in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, of which they have received the benefit. Lawrence, J., in *Bradley v. Ballard*, 55 Ill., 413. If the other party proceeds in the performance of the contract, expending his money and labor in the production of values which the corporation appropriates, the corporation will not be excused on the plea that the contract was beyond its powers. *Ib.* Corporations have the capacity to do wrong, and they may overstep the limits placed by law to their powers. When they violate their charters their acts are illegal, but not necessarily void. *Rock River Bank v. Sherwood*, 10 Wis., 230. They may acquire title to property in contravention of their charter, and transmit it to others; and in such case it is no defence for the corporation against the claim of one who, knowing the facts, paid the price at its request, nor excuse, in not crediting the proceeds of a mortgage given to secure the money advanced, that the transaction was *ultra vires*. *Farmer's and Miller's Bank v. Detroit & Milwaukee R.R. Co.*, 27 Ib., 372. The plea of *ultra vires* is not to be understood as an absolute and peremptory defence in all cases of excess of power without regard to other circumstances and considerations. It is not to be looked upon as a plea which denies the actual exertion of corporate power when a corporation enters into an engagement which, according to its charter, it ought not to make. But because such was the nature of the contract, it presents the breach of trust or duty to the shareholders as an excuse for the non-performance. If the person dealing with a corporation knows of the wrong done or contemplated, and he cannot show the acquiescence of the shareholders, he ought not to complain if he cannot enforce the contract. *Bissell v. Mich. Southern & Northern Ind. R.R. Co.*, 22 N. Y., 258, per Comstock, J. The plea is not to be entertained where its allowance will do a great wrong to innocent third persons. If the shareholders acquiesced in the abuse, the plea cannot be interposed. *Ib.* But see *Hood v. N. Y. & N. H. R.R. Co.*, 22 Conn., 502, in which Ellsworth, J., said: "If the directors, even with all the stockholders at their side, transcend the limits of the charter, and make contracts foreign to their business, they only act for themselves. The reason is, there can be no consent of the corporation. The consent of individual stockholders, however repeated, is not their consent, nor is it admissible proof to establish consent; so that, if it were true every stockholder had expressed his consent, it would make no difference in the case."

¹ *Smith v. Sheeley*, 12 Wall, 358.

² *Robinson v. Bland*, 2 Burr., 1077; *Howson v. Hancock*, 8 Term R., 577; *Utica Ins. Co. v. Scott*, 19 Johns., 1; *Same v. Cadwell*, 3 Wend., 296; *Same v. Bloodgood*, 4 Ib., 652; *Little v. O'Brien*, 9 Mass., 423; *Epis. Soc. v. Epis. Ch. in Dedham*, 1 Pick., 172; *White v. Franklin Bank*, 22 Pick., 181; *Rich v. Errol*, 51 N. H., 361.

Where a bank sold bonds of the State for less than their par value, in violation of its charter, and the transaction was consequently illegal and void, it was held that as the bank had appropriated to its use the money advanced upon the bonds, it was bound in equity to repay the money, with interest, upon a re-delivery of the bonds.¹ When real estate is sold by a corporation without authority, and the vendee takes possession, he need not surrender possession before bringing an action to recover the purchase money. "The cases in which possession must be surrendered before an action for the purchase money can be brought, are those where a contract has been made, and possession has been taken thereunder, and the vendee seeks to rescind the contract on the ground of defective title, or the inability of the vendor to perform the contract on his part, or of some fraudulent representations inducing its execution. In these cases the vendee must offer to restore whatever he has received before he can call upon the vendor to refund the purchase money. Where the contract is void there is nothing to rescind; no rights are acquired, and there are, in consequence, no rights to restore." "

¹ Whitney v. Peay, 24 Ark., 22. If money be paid in advance to a corporation on a contract *ultra vires*, the party paying the money may recover it in an action for money had and received, without any previous demand. Dill v. Wareham, 7 Metc., 438.

² McCracken v. City of San Francisco, 16 Cal., 591, per Field, J.

CHAPTER IX.

STATUTE OF FRAUDS.

228. Origin and language of statute.
229. Requirements of statute.
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231. Leading requisites of memorandum.
232. Memorandum may consist of several writings.
233. Separate papers constituting memorandum must refer to each other.
234. Memorandum must contain substantial terms of contract.
235. Receipt, or letters, when sufficient evidence of agreement.
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238. Parol evidence, when admissible, to identify property sold.
239. By which party memorandum must be signed.
240. Place and character of signature.
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242. Who competent to sign the memorandum as agent.
243. Agency how created.
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- 284. Gift of land, followed by improvements.
- 285. Promise of parent to convey land to child.
- 286. Promise of father to devise land to son.
- 287. Donor when required to pay for improvements.
- 288. Part performance by marriage.
- 289. Steps taken preparatory to performance.
- 290. Agreements not to be performed within a year.
- 291. Evidence of parol agreement.
- 292. Agreement how pleaded.

§ 228. *When and for what purpose enacted, and what it requires.*—It may constitute a defence, that the contract is within the statute of frauds. This statute, which had its origin in the reign of Charles the II., was one of several other enactments which distinguished that period, and marked an advancing civilization. It was passed in 1676, to change the common law by which title to land could be passed by livery of seisin without writing, the object being to avoid the frauds and the uncertainties of titles which had grown out of the old law. When livery of seisin was a sufficient form of transferring title to land, it was an open and notorious act, performed in the presence of neighbors, accompanied by symbolical delivery of the turf or twig, and a declaration of the quantity of the estate granted. But even this solemn investiture at common law was so open to frauds and perjuries, that it called for the correction of some statute requiring the contract to be put in writing. The statute of 29 Chas. II., Sec. 4, provides that no action shall be brought “to charge any person upon any agreement made in consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to

be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." The English statute has been substantially re-enacted in most of the States. In some of them, the contract is declared void if not in conformity with the provisions of the statute.¹ Special clauses in the statutes of the different States will be adverted to hereafter in discussing the distinctive principles of the subject.

§ 229. *Characteristics.*—It will be observed that the foregoing enactment does not refer to the solemnities of the contract, but to the procedure; so that a suit cannot be maintained, where the statute prevails, to enforce an agreement made abroad and valid there, which, if made where the suit is brought, would have been incapable of enforcement by reason of the statute.² It has been said that "the statute is not a mere rule of evidence, but a limitation of judicial authority to afford a remedy. It requires that contracts for the sale of lands, in order to be enforced by judicial proceedings, must be substantiated by some writing. This provision of law cannot be dispensed with merely for the reason that the want of such writing was occasioned by accident, mistake, or fraudulent representations, unless some other ingredient enters into the case to give rise to equities stronger than those which stand upon the oral contract alone which estop the other party from setting up the statute."³

¹ This is the case in the following States: Alabama, Code 1867, Sec. 1862; California, Code, Sec. 1741; Michigan, Comp. Laws 1871, Vol. II., p. 1455, Ch. 166, Sec. 8; Minnesota, Sts. 1873, Vol. I., p. 692, Sec. 12; Nebraska, Sts. 1873, p. 392, Ch. 25, Sec. 5; New York, Rev. Sts. 6th Ed., Vol. 3, p. 141; Oregon, Gen. Laws 1872, Ch. 8, Sec. 775; Wisconsin, Sts. 1871, Vol. II., Ch. 106, Sec. 8.

² *Leroux v. Brown*, 12 C. B., 801.

³ *Wells, J.*, in *Glass v. Hulbert*, 102 Mass., 25. See remarks of Chapman, C. J., in *Stockbridge Iron Co. v. Hudson Iron Co.*, *Ibid.*, 45. A parol agreement for the sale or exchange of land, may be specifically enforced, where it was made before the statute of frauds was passed. *Williams v. Lewis*, 5 Leigh, 686. A

§ 230. *Preliminary inquiry.*—The first consideration which obviously suggests itself in this connection is, what constitutes a sufficient “agreement, or memorandum or note thereof” within the meaning of the statute; and this includes not only the phraseology of the contract, but its mode of execution.

§ 231. *What deemed sufficient.*—The statute will be sat-

court of equity will compel specific performance of a contract, entered into by the assignee of a bond for title, to pay the purchase money to the original vendor. It is not a parol promise to answer for the debt of another; nor is it a parol contract for the sale of land. *Ford v. Finney*, 35 Ga., 258. A parol agreement that if A. will advance to B. fourteen hundred dollars, B. will assign to A. the sheriff's certificate of sale of real estate, and after A. has done certain specified things relating to a mortgage on the land, and other proceedings, that A. shall sell the property, and if he is not repaid out of the proceeds of such sale the amount advanced, B. will pay one-half of the deficiency, is a valid contract not within the statute of frauds. *Fraser v. Child*, 4 E. D. Smith, 153. An oral agreement, made by an inventor before letters patent are issued, to assign an interest in his invention to a capitalist who is to contribute the money necessary to make the invention available in the form of a patent, and both to contribute their services to make it remunerative, is not an agreement for the sale of goods, wares, or merchandise, within the statute of frauds; nor one which might not be performed within a year; but an agreement for a partnership. Such an agreement is valid, and capable of being enforced in equity, by compelling an assignment, an account, and such other relief as the circumstances of the case may require. *Somerby v. Buntin*, 118 Mass., 279. “Before letters patent are obtained, the invention exists only in right, and neither that right, nor any evidence of it, has any outward form which is capable of being transferred or delivered in specie. The words of the statute have never yet been extended by any court, beyond securities which are subjects of common sale and barter, and which have a visible and palpable form.” *Ib.*, per Gray, C. J. It was formerly held in England, that shares in a corporation were goods, wares, and merchandise within the statute of frauds. *Mussel v. Cooke*, Prec. Ch., 533; *Crull v. Dodson*, Sel. Cas. in Ch., 41; and it has been held in Massachusetts, that such shares, and even promissory notes, fall within the statute. *Tisdale v. Harris*, 20 Pick., 9; *Baldwin v. Williams*, 3 Metc., 365. But the modern decisions in England are the other way. *Browne on St. of Frauds*, Secs. 296, 298.

Where A., a tenant for life, allowed B. to cut a ditch through her land to supply his mill with water, and upon her death, C., the remainder man, demanded compensation, and a verbal agreement was made that B. should have the use of the ditch for a sum to be fixed by arbitrators, and C. refused to perform their award, it was held that the statute of frauds was a bar to B.'s bill for relief, and the bill was dismissed with costs. *Hamilton v. Jones*, 3 Gill & Johns., 127. A contract to sell a stock of drugs, the seller, as a part of the transaction, verbally agreeing to give the buyer a three years' lease of the store, is a contract within the statute, and a bill for specific performance was properly dismissed. *Strehl v. Evers*, 66 Ill., 77. See *Schulter v. Bockwinkle*, 19 Mo., 674; *William & Mary College v. Powell*, 12 Gratt., 372. A. sold land to B., and gave a bond for conveyance on payment of the purchase price. Afterward, judgment was obtained against B., on a note in which A. was surety, and execution issued against B. No property of B. having been found, A. directed the sheriff to levy on this lot, promising to make a good title to the purchaser. Held, that as the promise was verbal, it was within the statute of frauds, and could not be enforced. *Bryan v. Jamison*, 7 Mo., 106.

ified by a writing, however informal, which contains, either expressly or by necessary inference, all the terms of the agreement, to wit: the names of the parties, the subject matter of the contract, the consideration, the promise, and the signature of the party sought to be charged, leaving nothing open to future treaty.¹ It need not be under seal, nor acknowledged before a magistrate. Nor are words of inheritance necessary where the circumstances show an intention to pass the fee.² Such writing may be by an answer to a bill, an affidavit in equity, in bankruptcy, or a receipt for the purchase money, a bond, a note, or a letter written by the party to be charged to the person with whom he contracted, or to any other person.³ It may purport to be in the language of the vendor, or of the vendee, or of both. When it purports to be in the language of the vendee, by subscribing it the vendor vouches for the facts therein stated and adopts it as his own, and it thereupon becomes the joint act of both.⁴ A memorandum in pencil is

¹ Laythoarp v. Bryant, 2 Bing. N. C., 735; Ogilvie v. Foljambe, 3 Mer., 53; Nichols v. Johnson, 10 Conn., 192; Doty v. Wilder, 15 Ill., 407; McConnell v. Brillhart, 17 Ib., 354; Johnson v. Dodge, Ib., 433; McFarson's Appeal, 11 Pa. St., 503; Sanborn v. Flagler, 9 Allen, 474; Stone v. Browning, 68 N. Y., 598. A father, who resided in C. county, promised his son, who was then living in L. county, that if he would remove to a piece of land belonging to and near the residence of the former, he would give the land to his son. The son, at the time of the promise, had a family. He accepted the offer and removed to the land, and his father assigned to him the certificate of entry in these words: "I, Joseph Halsa, do *sine* the within certificate over to Amos Halsa, which is to empower him to lift the deed in his own name. April 18, 1835. Joseph Halsa." The officers of the Land Office refused to give a patent for the land to the son upon his claim under this assignment, and delivered it to the father. The son then applied for a deed, and upon the father declining to make a conveyance vesting the title in the son, he filed a bill for specific performance. It was held that the assignment of the certificate was a sufficient note or memorandum to take the case out of the statute of frauds. Halsa v. Halsa, 8 Mo., 393. But where the consideration named in the agreement was the assuming of a debt of the vendor, "and the balance of the purchase money to be paid on such terms as may be agreed on between said parties," it was held that the agreement could not be enforced, as the court could not compel parties to agree. Huff v. Shepard, 58 Mo., 242.

² McFarson's Appeal, *supra*.

³ Barkworth v. Young, 4 Drew, 13; Ewins v. Gordon, 49 N. H., 444; Tripp v. Bishop, 56 Pa. St., 424.

⁴ Joseph v. Holt, 37 Cal., 250; Welford v. Beazeley, 3 Atk., 503; Child v. Comber, 3 Swanst., 423, *n.* A. having verbally agreed to bid in land for B. at a sheriff's sale, took the title in his own name, but signed and delivered to B. an

sufficient.¹ The whole contract must be written,² or printed.³ The contract itself, and the memorandum which is necessary to its validity under the statute of frauds, are in their nature distinct things. The statute presupposes a contract by parol. The contract may be made at one time, and the note or memorandum of it at a subsequent time. Where, however, the promise of one party is the consideration for the promise of the other, the promises must be concurrent and obligatory on both parties at the same time.⁴

§ 232. *How a binding agreement may be made.*—The writing itself may contain all the particulars of the contract, or it may refer to some other instrument in writing for a part of them. The instrument subscribed may be partly written and partly printed,⁵ and consist of one or more pieces of paper, which, when connected, show the parties, property, terms, and consideration, and form together the whole contract.⁶ Sometimes there is a writing without sig-

account in which he charged B. with the purchase money. Held, a sufficient memorandum to take the case out of the statute of frauds, and let B. into a full investigation of the whole transaction. *Denton v. M'Kenzie*, 1 Dessaus Eq., 289.

¹ *Draper v. Pattina*, 2 Speers, 292; *Merritt v. Clason*, 12 Johns., 484.

² *Patton v. Develin*, 2 Phila., 103; *Cory v. Hyde*, 49 Cal., 470.

³ See next section.

⁴ *Lester v. Jewett*, 12 Barb., 502. The following memorandum of sale was held insufficient, it not being mutually binding: "This instrument of writing is to certify that I have this day sold to J. R. Shivell a certain tract of land described in a deed which has been duly acknowledged, which deed is now in my possession, and which is to be delivered to said Shivell on the payment of two thousand dollars on the 25th of December, 1863. J. B. Jones." *Jones v. Noble*, 3 Bush. Ky., 694. See *Yerger v. Green*, 4 Gill, 472; *Duvall v. Myers*, 2 Md. Ch., 401.

⁵ "It has never been considered any objection to contracts required by the statute of frauds to be in writing, that they were printed. It is true, that in these cases, usually the signature at the bottom is in manuscript, and the printed articles of contract leave the name to be filled up. In such cases the signature by the pen is necessary to the execution of the contract. And this is the more expedient mode, as it furnishes the greater facility for ascertaining its genuineness." *Dewey, J.*, in *Com. v. Ray*, 3 Gray, 447.

⁶ *Allen v. Bennet*, 3 Taunt., 169; *Ridgway v. Wharton*, 3 De G. M. & G., 677; *S. C.*, 6 House of Lds., 238; *Gaston v. Frankum*, 2 De G. & Sm., 561; *Powell v. Dillon*, 2 B. & B., 416; *Esmay v. Gorton*, 18 Ill., 483; *Tallman v. Franklin*, 14 N. Y., 584. The memorandum may be supplied by documents and letters written at various times, if they all appear to have relation to it, and if coupled to-

nature which contains all the terms of the contract, and a letter of the party referring to the document. But, in a transaction of this nature, care must be taken that the letter distinctly recognizes and adopts the writing. A written agreement was left in the possession of the defendant, who, in reply to a letter from the plaintiff's solicitor asking the defendant to meet him and sign the agreement, wrote stating that he had been from home, acknowledged that he had said that his word should be as good as his bond, and that there was time enough before Michaelmas to settle everything, and again said that "his word should always be as good as any security he could give." It was held that the letters and paper together constituted a valid agreement. Lord Thurlow said: "If a letter cannot be referred to the agreement, or does not contain proper terms, I cannot treat it as out of the statute. But I confess, on what appears here, the papers do refer to that agreement, and contain a promise to perform it. The defendant did intend by the letter to raise a confidence that the agreement should be performed."¹ It is difficult to discover anything in the foregoing correspondence that bears the semblance of a contract. The language of the defendant was evasive and non-committal, and showed reluctance rather than willingness to assent to the plaintiff's proposition. The case was afterward disapproved.² Where the conditions of sale

gether they contain, by statement or reference, all the essential parts of the bargain signed by the party to be charged, or his agent. *Williams v. Bacon*, 2 Gray, 387; *Marsh v. Hyde*, 3 Ib., 333. But when the memorandum is made out from several papers, they must be shown upon their face to have a mutual relation to each other, and the relation cannot be established by extrinsic evidence. *Morton v. Dean*, 13 Metc., 385; *Lerned v. Wannemacher*, 9 Allen, 412. County commissioners, having surveyed and platted a town and sold the lots, agreed with the surveyor that he should take two lots in payment for his services. At the sale, two lots were accordingly marked on the list of lots as sold to him, an allowance having previously been made for his services corresponding with the price of the lots, which allowance the surveyor never claimed. Held, that these several memorandums were sufficient to take the case out of the statute of frauds so as to be capable of specific enforcement in equity. *Bourland v. County of Peoria*, 16 Ill., 538.

¹ *Tawney v. Crowther*, 3 Bro. C. C., 161, 318.

² By Lords Redesdale, Cranworth, and Brougham. *Ridgway v. Wharton*, 6 House of Lds., 265, 271, 293. Acceptance and possession of the contract by the

signed by the plaintiff were in the hands of the defendants, whose letters expressly referred to them, it was held that no parol evidence was necessary to connect the two, and that therefore there was a binding contract.¹ And where A. wrote to B., offering to let a public house on certain terms, and B.'s clerk had an interview with A., and talked over the terms of the lease, and afterward B. replied that he was willing to take the premises of A., it was held that this referred to the terms contained in A.'s letter, and constituted a contract.² A letter may supply something material omitted from the agreement. Where there was a memorandum for a lease signed by the proposed lessee, but without the lessor's name, and afterward a letter written by the former, withdrawing the memorandum, but mentioning the lessor, it was held that the letter supplied the omission in the agreement, and rendered it binding under the statute.³ The contract may, of course, be wholly constituted by letters. This is very often the case.⁴ The sending by the plaintiff of a telegram to the defendant, and mailing a letter to him on the same day, stating that he had telegraphed accepting

vendee, and payment of money under it, are proof of his concurrence. *Johnson v. Dodge*, 17 Ill., 433. To constitute a contract in writing under the statute of frauds, a written offer to sell real estate must be accepted in writing. *Lang v. McLaughlin*, 14 Minn., 72. But a verbal acceptance of a written offer to sell personal property, is sufficient to constitute a valid agreement on which to charge the person by whom it is signed. *Sanborn v. Flagler*, 9 Allen, 474.

¹ *Dobell v. Hutchinson*, 3 A. & E., 355. And see *Saunderson v. Jackson*, 2 B. & P., 238; *Jackson v. Lowe*, 1 Bing., 9.

² *Wood v. Scarth*, 2 K. & J., 33.

³ *Warner v. Willington*, 3 Drew, 523. An able text-writer questions, very properly, it seems to us, the soundness of this decision, on the ground that the letter, looked at as a whole, affirmed that the memorandum was a mere offer. *Fry on Specif. Perform.*, 168, 169; referring to cases where a buyer of goods having sent a letter alluding to an invoice of the goods, but insisting that he was not bound to accept the goods, it has been held that there was no sufficient argument under the statute of frauds. *Cooper v. Smith*, 15 East., 103; *Richards v. Porter*, 6 B. & C., 437; *Dobell v. Hutchinson*, *supra*; *Gosbell v. Archer*, 2 A. & E., 500. So, where the buyer, in a letter, declined to accept the goods under a parol agreement, it was held that the case was not taken out of the statute. *Goodman v. Griffiths*, 26 L. J. Ex., 145. And in *Wood v. Midgley*, 5 De G. M. & G., 41, 46, the court refused to entertain the proposition advanced by counsel in his argument, that a letter declining to enter into an agreement constituted one.

⁴ See *Western v. Russell*, 3 V. & B., 187.

his proposition, is sufficient evidence of subscription to take the case out of the statute.¹

§ 233. *What to be shown when alleged agreement consists of more than one writing.*—When there are two writings, one containing the terms of the contract, and the other the signature and referring to the first, the paper thus referred to may be identified by parol.² Unless, however, there is a direct reference in one writing to the other, so as in effect to embody in itself the paper referred to without the aid of parol proof to effect such union, they cannot be considered together.³ Proposals had been issued by the plaintiff for the publication of a large number of prints from some of the scenes in Shakespeare's plays, upon certain terms and conditions. Printed copies of the prospectus of the publishers were lying in their shop for general inspection, but the book in which the defendant signed his name, had only for its title, "Shakespeare subscribers, their signatures," without any reference to the prospectus. It was held that as parol evidence was not admissible to show their connection, the defendant was not liable.⁴ In another case, application was made by a tenant to the solicitors of his landlord for a renewal of his lease. The solicitors sent

¹ *Trevor v. Wood*, 36 N. Y., 307. In Indiana the statute, Vol. I., p. 612, provides, that contracts made by telegraph "shall be considered as contracts in writing." Despatches by telegraph, however, between the parties, are insufficient to constitute a memorandum when they only show the terms of payment in part, and a direction from the defendant to the plaintiff to draw up a contract accordingly, but do not otherwise describe or refer to the subject of the contract; and the deficiency is not made up by a written instrument afterward signed by the defendant, describing the subject matter, which instrument is void as a contract on account of its having been executed on Sunday. *Hazard v. Day*, 14 Allen, 487.

² *Clinan v. Cooke*, 1 Sch. & Lef., 33; *Noale v. Buchanan*, 11 Gill & Johns., 314. It is not to be understood that any other rule in respect to the competency of parol evidence in relation to contracts within the statute is to be applied, than such as are applicable to written agreements in general. *Tallman v. Franklin*, *supra*; *S. C.*, 3 Duer, 395.

³ *Inhabs. of Freeport v. Bartol*, 3 Me., 340; *Carter v. Shorter*, 57 Ala., 253. Where an order for goods is drawn in duplicate, and one copy is signed by the seller and delivered to the purchaser, and the other copy is signed by the purchaser and delivered to the seller, the two papers taken together constitute a sufficient memorandum of the contract under the statute of frauds. *Rhoades v. Castner*, 12 Allen, 130.

⁴ *Boydell v. Drummond*, 11 East., 142.

the tenant the report of the surveyor recommending that a lease be given for fourteen years at a specified rent if certain repairs were made by the tenant. The tenant wrote in reply assenting to the repairs and rent, but asking for a lease of twenty-one years. Nothing was agreed upon at that time ; but, some months afterward, a negotiation between the tenant and landlord resulted in the latter writing to the tenant, promising him a lease for fourteen years, "at the rent and terms agreed upon" ; to which the tenant replied in a letter of acceptance. It was held that parol evidence was admissible to connect the report and the tenant's previous letter with the subsequent letters ; that as it appeared there had not been any other rent and terms agreed upon than those mentioned in the report, there was a sufficient memorandum in writing with reference to the statute of frauds, and that the tenant was entitled to a decree for specific performance.¹ Where a writing is referred to, the reference must be so clear as to prevent the possibility of another paper being substituted for it ;² and the instrument referred to must be in existence when the contract is signed.³ A contract of sale did not refer to any plan, but the agents who signed it for the parties, signed at the same time the following memorandum written on a plan of the property : " Plan of property sold to and purchased by D., 23d Oct., 1874. N. B. The property included in the purchase, is edged with red color." It was held that the plan was sufficiently incorporated, and that the description in the contract was controlled by it.⁴ An advertisement to which no reference is made in the agreement cannot be introduced to supply a term.⁵ And so the mere admission in writing of an agreement, without ascer-

¹ Baumann v. James, L. R. 3, Ch. 508.

² Smith v. Arnold, 5 Mason, 416 ; Waul v. Kirkman, 27 Miss., 323 ; Stocker v. Partridge, 2 Robertson, 193.

³ Hyde v. Cooper, 13 Rich. Eq., 250.

⁴ Drainage Commrs. v. Dunkley, L. R. 4, Ch. D. 1.

⁵ Clinan v. Cooke, 1 Sch. & Lef., 22.

taining its terms, will be inoperative.¹ The statute cannot be complied with by a writing which refers to a verbal agreement, whether that agreement is subsisting or to be made afterward.² Where a paper duly signed did not refer to a writing, but to the terms agreed upon by parol, it was held that there was no valid contract.³

§ 234. *What essential to constitute a binding agreement.*—The memorandum, in order to satisfy the statute, must contain the substantial terms of the contract, expressed with such certainty, that they may be understood without resorting to parol evidence.⁴ “The jurisdiction of equity, in specific performance, proceeds on the supposition that the parties have not only agreed, as between themselves, upon every material matter, but that the matters so agreed on are of such a nature, and the subjects of agreement so delineated or indicated, either directly, or by reference to something else, or so raised to view by legitimate implication, that the court can and may collect, and in their proper relations, all the essential elements, and proceed intelligently and practically in carrying into execution the very things agreed on and standing to be performed.”⁵ When

¹ *Rose v. Cunynghame*, 11 Ves., 550; *Clerk v. Wright*, 1 Atk., 12.

² *Hyde v. Cooper*, *supra*.

³ *Ridgway v. Wharton*, 3 De G. M. & G., 677; S. C., 6 House of Lds., 238. An imperfect memorandum cannot be aided by handbills and newspaper notices, signed by the defendant, and exhibited by him at the time of the sale, in which the terms of sale are stated. *O'Donnell v. Leeman*, 43 Me., 158.

⁴ *Blagden v. Bradbear*, 12 Ves., 466; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch., 273; *Smith v. Stanton*, 15 Vt., 685; *Adams v. M'Millan*, 7 Porter, 73; *Abeel v. Radcliff*, 13 Johns., 297; *Calkins v. Falk*, 39 Barb., 620. Where on the sale of a church pew at auction, the only memorandum was an entry of the auctioneer on a chart of the ground floor of the church, of the name of the purchaser, and of the amount bid by him, it was held insufficient. *First Baptist Church of Ithaca v. Bigelow*, 16 Wend., 28. And see *Hinde v. Whitehouse*, 7 East., 558. An agreement to convey land “for \$2,500, and mortgage to remain at five per cent.,” was held not a sufficient memorandum. *Grace v. Denison*, 114 Mass., 16.

⁵ *Graves, C. J.*, in *Blanchard v. Detroit, etc., R.R. Co.*, 31 Mich., 43. Where a memorandum of agreement to grant a lease did not state any time for the commencement of the lease, it was construed as an agreement for a lease to commence immediately from the date of the agreement, and held sufficient under the statute of frauds. *Jaques v. Millar*, L. R. 6, Ch. D. 153. Although the memorandum must show who are the parties to the contract, yet this may be done by description, and parol evidence is then admissible to show who the person described is. *Mayer v. Adrian*, 77 N. C., 83.

the writing is the mere basis for a contract, and not the contract itself, or any of the terms remain for future adjustment; or where the matter is left open, and one party may still withdraw from it, or there appears to be an intention to negotiate further, there is no binding agreement.¹ In a suit by the vendee against the vendor for specific performance, the only agreement proved was an offer, by the purchaser's solicitor, of twenty-five thousand pounds for certain real estate, which the vendor's agent accepted, "subject to the terms of a contract being arranged between his (the vendor's) solicitor and yourself." This being regarded as a mere agreement for a contract, with respect to which, although some terms were agreed on, the rest were to be settled by future arrangement, the bill was dismissed.² The court will refuse to interfere when it is "reasonably doubtful whether what passed was only treaty, let the progress toward the confines of agreement be more or less."³ A written authority by the owner of real estate to a broker to sell the land upon the terms therein mentioned, subscribed by the owner, and an agreement to accept those terms written across the face of the paper in the hands of the broker, and subscribed by the purchaser, do not constitute a valid contract for the sale of the land under the statute.⁴ A writing, however, duly signed, and containing all the terms agreed upon, will constitute a binding contract, although it appear, from the paper, that it was intended there should be drawn up a more formal agreement.⁵ A. wrote to B., "I offer you three thousand pounds for the estate." To which B. replied, "I accept your offer, and if you approve

¹ *Frost v. Moulton*, 21 Beav., 596; *Wood v. Midgley*, 5 De G. M. & G., 41; *Lord Glengal v. Barnard*, 1 Ke., 769; *Tawney v. Crowther*, 3 Bro. C. C., 318; *Stratford v. Bosworth*, 2 V. & B., 341.

² *Honeyman v. Marryat*, 21 Beav., 4; S. C., 6 House of Lds., 112.

³ *Lord Eldon*, in *Huddleston v. Briscoe*, 11 Ves., 592.

⁴ *Haydock v. Stow*, 40 N. Y., 363. It is a mere power of attorney from the owner to the broker, capable of being revoked.

⁵ *Fowle v. Freeman*, 9 Ves., 351. And see *Ridgway v. Wharton*, 6 House of Lds., 264; *Thomas v. Dering*, 1 Ke., 741; *Cowley v. Watts*, 17 Jur., 172.

of the inclosed, sign the same, and I will, on receipt of the deposit, sign you a copy." The inclosure was not produced. It was held that there was a binding contract, and that the inclosure was a mere means of carrying the agreement into effect.¹ So, a correspondence about the taking of a house, was held to constitute a sufficient agreement, though the party to whom the proposition was made, accepted it thus: "These terms I have submitted to Mrs. S. and I am authorized to say that they are accepted, and that her solicitor will draw up a proper agreement for signature, which I will forward to you."² But when a term is to be introduced into the formal agreement which is not contained in the previous one, the latter will not be binding. And when a writing does not conclusively appear to constitute the final arrangement between the parties, the fact that they intended a subsequent more formal agreement will afford a strong presumption that the previous negotiations were not designed to be regarded as a contract.³

§ 235. *Agreement by receipt or letters.*—A receipt signed by the vendor of real estate for part of the purchase money may constitute a sufficient memorandum of sale.⁴ It must, however, describe the land sold, and state the price.⁵ A paper purporting on its face to be a receipt for

¹ Gibbins v. Northeastern Dist. Asylum, 11 Beav., 1.

² Skinner v. M'Douall, 2 De G. & Sm., 265.

³ Ridgway v. Wharton, *supra*; Fry on Specif. Perform., 160. A memorandum of an agreement for a lease must specify the term for which the lease is to be given. Hodges v. Howard, 5 R. I., 149.

⁴ Westervelt v. Matheson, 1 Hoffm. Ch., 36.

⁵ Barickman v. Kuykendall, 6 Blackf., 21; Ellis v. Deadman, 4 Bibb., 466; Soles v. Hickman, 20 Pa. St., 180. Although the price to be paid must in general be shown by the contract, and cannot be supplied by parol, yet when it appears from the agreement that the consideration has already been paid, the amount need not be stated (Holman v. Bank of Norfolk, 12 Ala., 369; Fugate v. Hansford, 3 Litt., 262); there being in such case nothing to be supplied by parol. It is sufficient if the memorandum state that the price is to be referred to the arbitration of a third person to determine the value of the thing sold. Brown v. Bellows, 4 Pick., 178. At law, when a credit is given, it must be stated in the memorandum. Wright v. Weeks, 3 Bosw., 372. In the following States the statute provides that the consideration need not be expressed in the writing: Illinois, Sts. of 1874, Vol. 3, P. 210, Secs. 1, 2; Indiana, Sts. Ch. 66, Sec. 1; Kentucky, Rev. Sts., Ch. 22, Sec. 1; Maine, Rev. Sts., Ch. 111, Sec. 1; Massachusetts, Gen. Sts. 1873, Ch. 105, Sec. 2; Michigan, Comp. Laws, 1871

purchase money, but inadmissible as evidence of the payment of the money for lack of a stamp, may nevertheless be a sufficient memorandum of the contract of sale to take the case out of the statute of frauds.¹ In order to take an agreement out of the statute by letters, all of the terms of the agreement must be assented to on both sides.² The owner of land wrote to his agent that he would sell it for a certain sum, and a person said he would buy it at that price. It was held insufficient to take the case out of the operation of the statute of frauds; the delivery of the letter to the agent having no greater effect than if it had been retained in the possession of the owner of the property.³ A correspondence by letters which reasonably imports a conclusion is sufficient.⁴ A man, having driven from his house without provocation, his wife and daughter, several years afterward invited the daughter by letter to return and live with him, promising to leave her his property. The daughter, with the consent of her mother, accepted the invitation; but, shortly after, was again compelled to leave her father's house upon a charge of disobedience; and he subsequently devised his property to strangers. It was held that the letter constituted a valid contract, which a court of equity would enforce against the executors and devisees.⁵ Of course, when a person writes to another offering to sell real estate on the terms therein specified, which offer the other immediately accepts by letter, there is a valid and binding agreement between the parties which a court of equity will enforce.⁶ But although a valid contract may be made by correspondence, yet "care should always be taken not to construe, as an

Ch. 166, Sec. 9; Nebraska, Sts. 1873, Ch. 25, Sec. 24; Virginia, Code 1849, Ch. 143, Sec. 1; West Virginia, Code, Ch. 98, Sec. 1.

¹ Evans v. Prothero, 13 Eng. L. & Eq., 163.

² Nesham v. Selby, L. R. 13, Eq. 191; Affd. L. R. 7, Ch. 406.

³ Steel v. Fife, 48 Iowa, 99.

⁴ Huddleston v. Briscoe, 11 Ves., 591; Stratford v. Bosworth, 2 V. & B., 341; Johnson v. Ronald, 4 Munf., 77.

⁵ Gray v. James, 4 Dessaus Eq., 185.

⁶ Matteson v. Scofield, 27 Wis., 671.

agreement, letters which the parties intended only as a preliminary negotiation. The question in such cases always is, did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound?"¹ S. wrote to C., proposing to sell him certain land at a price stated. C. replied by letter as follows: "After considering your proposition, I have come to the conclusion that I will take your place if there is nothing else against it save what you have shown me. So soon as Mr. O. signs the deed of waiver of his equity of redemption, let me know, and I will come over. It seems that it is almost impossible for us all to meet at once. Write me by mail." Held not a sufficient memorandum under the statute of frauds.² Where negotiations were had between the parties with a view to an agreement, but it was doubtful whether there was ever a distinct understanding on the subject, and the only written evidence of the agreement relied on was a supposed letter written by the defendant to the plaintiff alleged to have been lost, it was held that the proof was insufficient to take the case out of the statute.³

§ 236. *Insufficient description of subject matter.*—The memorandum of a contract for the sale and purchase of real estate must clearly indicate the property, and nothing remain to be done in which the concurrence of both parties is necessary to ascertain the location or quantity of the land to be conveyed.⁴ The memorandum in the following cases

¹ Lyman v. Robinson, 14 Allen, 242, per Foster, J.

² Carter v. Shorter, 57 Ala., 253.

³ Ballingall v. Bradley, 16 Ill., 374. A letter written by the buyer to the seller alluding to lumber bought and to be delivered, but not stating the contract, price, quantity, quality, time, or place, is not a sufficient memorandum. Waterman v. Meigs, 4 Cush., 497.

⁴ Parker v. Bodley, 4 Bibb., 102; Force v. Dutcher, 18 N. J. Eq., 401; Camden & Amboy R.R. Co. v. Stewart, Ibid., 489; Hudson v. King, 2 Heisk, 560; McGuire v. Stevens, 42 Miss., 724; Whelan v. Sullivan, 102 Mass., 204; Ferguson v. Staver, 33 Pa. St., 411. No more particular description is necessary

was wholly indefinite, and therefore insufficient: "New Orleans, June 25th, 1870. Received from Mr. Holmes, one hundred dollars, as part payment on a piece of property on the corner of Main and Pearl Streets, City of Natchez, County of Adams, State of Miss. Eliza Evans";¹ "Bought of Wm. R. James, an ice house and lot, \$140";² "The tract of land to Wm. Meadows, at \$5.48," entered by an auctioneer in his book of sales;³ "Fifty dollars, and the lot to build on," written in a subscription paper circulated to raise money to build a church;⁴ an order sent by the vendor of land to his attorney, "Sir: Be so good as to make James Kay a deed to the sixty-four acres of land that is laid down in your plat, and I will see you shortly, to make the other deeds";⁵ "This is to certify, that I have sold to Chas. Hazard, this twenty-eighth day of May, 1852, a certain lot of land, containing about eleven acres, to be measured, for nine hundred dollars an acre. I to have the present crop. One-half of the purchase money to be paid in fall of 1852. The balance to be paid on the 25th of March, 1853. The deed to be given on the first day of September, and sooner, if I should require it. That is to say, one-half of the purchase money to be paid at the time of the delivery of the deed, May 28, 1852";⁶ "Received of John W. Stamps, six hundred dollars in part payment of one undivided tract of land known as the Roberts tract, bounded, etc. (stating the boundaries). The payments were made, four hundred dollars on the 15th of May, 1849, and one hundred and fifty dollars 20th of June, 1849, and fifty, the 20th of August, 1849, making six hundred dollars in all. The tract contained three hundred and thirty acres; cost five dollars

under the statute of frauds in a contract for the sale of real estate, than in one relating to personal property. In each, to constitute a bargain and sale, or a contract which will be specifically enforced in equity, the subject matter thereof must be identified. Foster, J., in *Hurley v. Brown*, 98 Mass., 545.

¹ *Holmes v. Evans*, 48 Miss., 247.

² *Pipkin v. James*, 1 Humph., 325.

³ *Meadows v. Meadows*, 3 McCord, 458.

⁴ *Church of the Advent v. Farrow*, 7 Rich Eq., 378.

⁵ *Kay v. Curd*, 6 B. Mon., 100.

⁶ *Ives v. Armstrong*, 5 R. I., 567.

and six cents per acre, this 28th of Sept., 1849. James M. Sheid.”¹ A. and B. being tenants in common of a tract of land, A. made a verbal sale of his interest in one hundred and fifty acres of it to C., and subsequently sold and conveyed the remainder of his interest to B., “saving and reserving a certain tract sold by the said A. to C., within said grant, supposed to contain about one hundred and fifty acres; and the undivided interest, title, and claim of the said B. in and to said tract sold to said C., forms a further consideration, and said contract is hereby affirmed for the benefit of said A.” It was held that as the reservation did not purport to set out the contract between A. and C., or describe the land sold to him, there was no sufficient memorandum to take the contract out of the statute of frauds.²

§ 237. *Sufficient description.*—A contract for the sale of real estate is valid, which is sufficiently descriptive of the land to enable a surveyor to locate it.³ A receipt for money “in part payment for the tract of land that I was interested in, and sold by the sheriff, and purchased by Col. C. L. Goodwin, and which land was sold by C. L. Goodwin to Benjamin Hatcher,” constitutes a sufficient memo-

¹ Sheid v. Stamps, 2 Sneed, 172. A memorandum of purchase which simply states the amount agreed to be paid, and the terms of payment, for “the whole property, from cellar to top, including lease, press, boiler and engine, type, fixtures, furniture, etc.,” is insufficient to take the contract out of the statute of frauds. Farwell v. Mather, 10 Allen, 322. But see Little v. Pearson, 7 Pick., 301.

² Wright v. Cobb, 5 Sneed, 143. A written offer made to another, and accepted by him, to sell “all that piece of property known as the Union Hotel property,” is not a sufficient description of the real estate offered for sale. King v. Wood, 7 Mo., 389. In a suit for the specific performance of a contract for the sale and purchase of a lot of land, the plaintiff relied upon the following copy of an account taken from the books of H. C. Owens: “1841. William Plummer to H. C. Owens, Dr., to 4 loads of rock, one lot at one year’s credit, 125.” The account then proceeded to charge for the erection of a house, and for building materials. Held, too vague and uncertain, to take the case out of the statute. Plummer v. Owens, Busbee Eq., 254. The following receipt, purporting to contain a statement of the terms of the purchase of real estate by Burnham & Clark, was held a sufficient memorandum of sale: “Ellsworth, Dec. 15, 1834. Received of Daniel Burnham and Cyrus S. Clark, one thousand dollars, to be accounted for if they shall furnish me satisfactory security for certain lands on the Naraguagus river, say, one hundred and nineteen thousand acres, for one hundred and thirteen thousand dollars, on or before Friday morning next, otherwise to be forfeited. John Black.” Clark v. Burnham, 2 Story, 1.

³ White v. Hermann, 51 Ill., 243; Wiley v. Robert, 27 Mo., 388; Boardman v. Ford, 6 Pet., 345; Hooper v. Laney, 39 Ala., 338.

randum of the agreement.¹ So of a letter written by the owner of land, to another, saying that he had agreed with a third person to sell the latter the land, setting forth the terms of the contract and the consideration, and describing the property sold, as "the land now claimed by me" (the writer of the letter), "on Dry Creek, some two hundred acres of bottom land, and seven hundred acres of upland."² So of a receipt for the purchase money, signed by the vendor, describing the property sold as "the tract of land whereon I live, known as the William Wynn farm."³ Also of a memorandum of sale describing the property agreed to be conveyed, as the vendor's house and lot "north of Kinston"; it being admitted by the defendant in her answer, that she owned but one house and lot in the county.⁴ A note addressed by the owner to his agent, stating that a person named, had that day called on the owner, and "agreed to take the pasture lot" for a sum specified, naming the terms of payment, acknowledging the receipt of twenty dollars "on the above contract," and concluding with, "make the papers, and I will pay your commissions," was held a sufficient memorandum of the contract of sale.⁵ And the same was held of a contract as follows: "I will give John Simpson one hundred acres of the land next to either Stukely, or Newell, for \$450; or I will give him the two hundred acres, with a clear title, for his house and lot. Wm. S. Rankin."⁶

§ 238. *Identification of subject of sale.*—Parol evidence can only be resorted to, to show the locality of the land con-

¹ Hatcher v. Hatcher, 1 McMullan Eq., 311. ² Moss v. Anderson, 44 Cal., 3.

³ Simmons v. Spruill, 3 Jones Eq., 9.

⁴ Phillips v. Hooker, Phil. N. C. Eq., 193. And see Atwood v. Cobb, 16 Pick., 227. Where a vendor signed the following: "Mem. 28th of May, 1852. I agree to sell R. H. Ives the Peckham farm, now owned and occupied by me, say, about 45 acres, in Newport, for fifteen thousand dollars (15,000) payable the 25th of March, when possession is to be given, he, R. H. I., paying the annuity for December, 1852," it was held sufficient to support a bill for specific performance. Ives v. Hazard, 4 R. I., 14.

⁵ Spangler v. Danforth, 65 Ill., 152. ⁶ Simpson v. Breckenridge, 32 Pa. St., 287.

tracted to be sold, when the memorandum refers to something extrinsic by which the land can be identified; as where receipts given by the vendor to the vendee for the purchase money, stated that the money paid was for "the Fleming farm on French Creek";¹ but describing the property sold as a house and lot in a town named would be wholly vague and indeterminate.² On the other hand, a written agreement to sell a house "on Church Street" is sufficient, and parol evidence is admissible to identify it.³ Where the writing was an agreement to sell "a house and lot on Amity Street," and there were several such, parol evidence was received to show that there was only one house and lot which the defendant had a right to convey, and that the parties had been in treaty for the sale and purchase of it.⁴ Such a case "is not a question of the sufficiency of the writing under the statute of frauds, so much as it is the right to resort to parol evidence in aid of the writing where an ambiguity exists in respect to the property intended to be sold, or to which the contract relates. The most specific and precise description of the property intended requires some parol proof to complete the identification. A more general description requires more. When all the circumstances of possession, ownership, situation of the parties, and their relation to each other and to the property, as they were when the negotiation took place, and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement."⁵ On this principle, where the terms employed in the memorandum of a contract for the sale of goods are technical or equivocal on the face of the instrument, or made so by reference to extraneous circumstances, parol

¹ Ross v. Parker, 72 Pa. St., 186.

² Murdock v. Anderson, 4 Jones Eq., 77.

³ Mead v. Parker, 115 Mass., 413.

⁴ Hurley v. Brown, 98 Mass., 545.

⁵ Ibid, per Wells, J.

evidence of the usage and practice in the trade is admissible to explain the meaning.¹

§ 239. *By whom agreement to be signed.*—With regard to the execution of the memorandum, where the statute provides that it shall be signed by the party to be charged, it is sufficient that it contain the signature of the person against whom it is sought to be enforced, or of his agent; while, in those States in which the writing is required to be subscribed by the party or his agent making the lease or sale, his signature is indispensable.² In New York the

¹ *Salmon Falls Manuf. Co. v. Goddard*, 14 How., 446. Where the only memorandum of a sale was a credit in the words, "By my purchase of your half of E. B. wharf and premises this day between us, \$7,578.63," which were contained in a stated account between the parties, and in the handwriting of the defendant, whose name appeared only at the top of the account so stated, and which showed a balance due the complainant, it was held to be sufficient to take the case out of the statute; and that the particular estate designed by the words, "Your half E. B. wharf and premises," might be shown by other evidence. *Barry v. Coombe*, 1 Pet., 640.

² *Hatton v. Gray*, 5 Vin. Abr., 525; Pl. 4, S. C. 2 Cas. in Ch. 164; *Buckhouse v. Crosby*, 2 Eq. Cas. Abr. 32, Pl. 44; *Egerton v. Mathews*, 6 East., 307; *Allen v. Bennet*, 3 Taunt., 169; *Laythoarp v. Bryant*, 2 Bing. N. C., 735; *Farwell v. Lowther*, 18 Ill., 252; *Ivory v. Murphy*, 36 Mo., 534; *Smith & Fleek's Appeal*, 69 Pa. St., 474; *Perkins v. Hadsell*, 50 Ill., 216; *Estes v. Furlong*, 59 Ib., 298; *Barstow v. Gray*, 3 Me., 409; *Getchell v. Jewett*, 4 Ib., 350; *Morin v. Martz*, 13 Minn., 198; *Douglass v. Spears*, 2 Nott & McCord, 207; *Old Colony R.R. Corp. v. Evans*, 6 Gray, 25; *Fenly v. Stewart*, 5 Sandf., 401; *Justice v. Lang*, 42 N. Y., 493; S. C., 52 Ib., 323; *Worrall v. Munn*, 5 Ib., 229; *Bleecker v. Franklin*, 2 E. D. Smith, 393; *Van Sault v. Edwards*, 43 Cal., 458; *Rutenberg v. Main*, 47 Ib., 213; *Lowry v. Mehaffy*, 10 Watts, 387; *Tripp v. Bishop*, 56 Pa. St., 424; *Slater v. Smith*, 117 Mass., 96; *Woodward v. Aspinwall*, 3 Sandf., 272; *McCrea v. Purmort*, 16 Wend., 460; *Shirley v. Shirley*, 7 Blackf., 452; *Cabot v. Cabot*, 3 Pick., 83; *Ives v. Hazard*, 4 R. I., 14. In Pennsylvania it is only the lessor or grantor who is required to sign the agreement. His contract must be in writing and signed by him, but the statute requires no written evidence of the engagement of a lessee or grantee. The statute of frauds in that State was passed for the protection of land-owners, to guard them against perjuries in the proof of parol contracts. To secure this protection it prescribed a rule of evidence by which alone their estates can be diverted. *Lowry v. Mehaffy*, *supra*; *McFarson's Appeal*, 11 Pa. St., 503; *Tripp v. Bishop*, 56 Ib., 424, per Strong, J.; *Parish v. Koons*, *Parson's Sel. Eq. Cas.*, 78. The permitting of a contract to be enforced, which is signed by one of the parties only, has been objected to by eminent judges. In *Clason v. Bailey*, 14 Johns., 489, Chancellor Kent said: "I have thought, and have often intimated, that the weight of argument was in favor of the construction that an agreement concerning lands, to be enforced in equity, should be mutually binding; and that the one party should not be at liberty to enforce at his pleasure an agreement which the other party was not entitled to claim; but, notwithstanding the objection, it appears from the review of the cases, that the point is too well settled to be now questioned." And see *Wilson v. Clark*, 1 Watts & Serg., 554. The ground upon which courts of equity proceed in such cases is, that as the statute of frauds requires only the signature of the party to be charged to become legally

former statute of frauds only required contracts for the sale of land to be signed by the party who was attempted to be charged upon the contract. Hence, the question frequently arose, whether the purchaser could not be charged upon his contract, although such contract was not signed by the vendor so as to make it legally binding upon him. But no such question can arise upon the present statute; the vendee who has signed the contract, not being liable thereon, unless it has been properly executed by the vendor or his agent.¹ The statute in Michigan, Minnesota, Nebraska, and Wisconsin is the same in this respect as the existing New York statute.²

§ 240. *How signature to be made.*—The statute of Chas. II. provides that the memorandum, or note, shall be "*signed*," and this language is used in the statute of the following States: Arkansas,³ Illinois,⁴ Iowa,⁵ Kentucky,⁶ Massachusetts,⁷ Missouri,⁸ Nebraska,⁹ New Hampshire,¹⁰ New Jersey,¹¹ North Carolina,¹² Ohio,¹³ Rhode Island,¹⁴ Ten-

binding upon him, equity finding "a contract legally binding, will decree its performance. *Rogers v. Saunders*, 16 Me., 92; *Sams v. Fripp*, 10 Rich. Eq., 447. A court of equity frequently refuses to decree the specific performance of a contract which is signed by only one of the parties, because the want of mutuality "often constitutes an equitable ground for such refusal, as if the party not signing the agreement, and therefore not legally bound, takes advantage of his position, and delays its fulfilment till it is ascertained whether the bargain is advantageous to him." *Young v. Paul*, 20 N. J. Eq., 401, per Williamson, Ch. The acceptance of a deed, which in terms provides that the grantee shall pay off a certain incumbrance, is an undertaking by the grantee to pay the incumbrance. The acceptance of the deed makes it a contract in writing binding upon the grantee, just as the acceptance by a lessee of a lease in writing signed only by the lessor makes it a written contract binding upon such lessee; and a suit can be instituted on it, and the same rights be maintained, as though it were also signed by the grantee. *Schumaker v. Sibert*, 18 Kansas, 104.

¹ *Townsend v. Hubbard*, 4 Hill, 351; *McWhorter v. McMahan*, 10 Paige Ch., 386.

² *Comp. Laws of Mich.*, Vol. 2, P. 1455, Ch. 166, Sec. 8; *Sts. of Minn.*, Vol. 1, P. 692, Sec. 12; *Sts. of Neb.*, P. 392, Ch. 25, Sec. 5; *Sts. of Wis.*, Vol. 2, P. 1254, Ch. 106, Sec. 8.

³ *Sts.*, Ch. 73, Sec. 1.

⁴ *Sts.*, Ed. of 1874, Vol. 3, P. 210.

⁵ *Code of 1873*, Sec. 3663.

⁶ *Rev. Sts.*, Ch. 22, Sec. 1.

⁷ *Rev. Sts.*, Ch. 105, Sec. 1.

⁸ *Sts. of 1870*, Ch. 62, Sec. 5.

⁹ *Sts. of 1873*, Ch. 25, Sec. 5.

¹⁰ *Sts. of 1867*, Ch. 201, Sec. 12.

¹¹ *Nixon's Dig.*, 4th Ed., p. 358, Sec. 4.

¹² *Code Ch.*, 50, Sec. 11.

¹³ *Rev. Sts.*, Ed. of 1870, Ch. 47, Sec. 5.

¹⁴ *Sts. of 1872*, Ch. 193, Sec. 8.

nessee,¹ Texas,² Vermont,³ Virginia,⁴ and West Virginia.⁵ With reference to the place and character of the signature, the person to be charged may insert his name in any part of the paper—at the top, in the middle, or at the bottom;⁶ and it may be in the third person, as “Mr. A. B. has agreed,” or “proposes,” etc.;⁷ all that is necessary being, that the name of the party shall be affixed in such a manner as to authenticate the instrument. But though the memorandum be in the party’s handwriting, the name must be actually written, or something be done equivalent thereto.⁸ Where

¹ Sts. of 1871, Vol. I., Sec. 1758.

² Pasch. Dig., p. 649, Sec. 3875.

³ Sts. of 1870, Ch. 66, Sec. 1.

⁴ Code of 1849, Ch. 143, Sec. 1.

⁵ Code, Ch. 98, Sec. 1.

⁶ *Hawkins v. Chace*, 19 Pick., 502; *McConnell v. Brillhart*, 17 Ill., 351; *Higdon v. Thomas*, 1 Har. & Gill, 139; *Anderson v. Harold*, 10 Ohio, 399; *Wright v. King*, *Harring*, Mich., Ch. 12; *Wise v. Ray*, 3 Greene, Iowa, 430.

⁷ *Ogilvie v. Foljambe*, 3 Mer., 53; *Proper v. Parker*, 1 R. & My., 625; *Bleakley v. Smith*, 11 Sim., 150; *Western v. Russell*, 3 V. & B., 187; *Morison v. Turnour*, 18 Ves., 175; *Knight v. Crockford*, 1 Esp., 190; *Yerby v. Grigsby*, 9 Leigh., 387; *Penniman v. Hartshorn*, 13 Mass., 87; *Cabot v. Haskins*, 3 Pick., 83.

⁸ *Hawkins v. Holmes*, 1 P. Wms., 770; *Hubert v. Turner*, 4 Scott, N. R., 486; *Selby v. Selby*, 3 Mer., 2; *Barry v. Law*, 1 Cranch C. C., 77; *Bailey v. Ogden*, 3 Johns, 399. When an agreement is not executed, equity will not enforce specific performance, even though the non-execution was by reason of the fraudulent interference of the other party. *Gilbert v. Trustees, etc.*, 12 N. J. Eq. (1 Beas.), 180. A husband and wife having entered into an agreement for the sale of certain land, he had a deed prepared which he signed and acknowledged, but which the wife refused to execute. A suit having been brought to enforce the sale, a decree was rendered dismissing the bill as to the wife, but ordering a specific performance of the contract as to that part of the land belonging to the husband. Held error. The husband’s signature was not of the contract he had made, but only of a part of it, and the memorandum was incomplete, and could not be evidence of the contract. *Johnson v. Brooks*, 31 Miss., 17.

The question has been considerably discussed in the English courts, whether a mere sealing of the instrument might not be deemed a sufficient compliance with the statute. The fact that such a question has been raised, and decided in the affirmative by able judges, shows the extreme latitude of construction accorded to this portion of the statute. The reasons on which the substitution of a seal for the party’s name has been allowed, seems to us specious, and the practice calculated to invite fraud. In *Cherry v. Heming*, 4 Wels. Hurl. & Gord., 631, although the decision of the case did not render it necessary for the court to pass upon the sufficiency of sealing (where a written agreement, which, by its terms, was not to be performed within a year, was sealed without being signed), yet the opinion of the court on the question was given by Baron Rolfe, as follows: “I am strongly inclined to think that the statute does not extend to deeds, because its requirements would be satisfied by putting their mark to the writing. The object of the statute was to prevent matters of importance from resting on the frail testimony of memory alone. Before the Norman time, signature rendered the instrument authentic. Sealing was introduced because the people in general could not write. Then there arose a distinction between what

the owner of land gave to a railroad company a bond to convey to the company certain land through which it was authorized to make its road on payment of a specified sum of money at a given time, and the company entered and took the land for the purposes of its road, but refused to accept a deed and pay the stipulated sum of money, it was held that as the agreement was not signed by the company, it could not be enforced against it in equity.¹ A letter which commenced, "My dear Robert," and ended with the words, "do me the justice to believe me the most affectionate of mothers," was held not to be signed within the statute.² If the party cannot write, the signature may be by his mark.³ Where the buyer's name was stated in the commencement, and signed with his initials, it was held sufficient.⁴ The signature may be in pencil.⁵ And if the party's name be printed or stamped on the memorandum, he intending it at the time as his signature, and affirming it to be such, it will constitute a signing within the requirements of the statute.⁶ Thus, where a vendor inserted in a printed invoice, which contained his name, the name of the purchaser, it was held that there was such a ratification and adoption of the printed name as satisfied the statute.⁷ It

was sealed and what was not sealed, and that went on until society became more advanced, when the statute ultimately said that certain instruments must be authenticated by signature. That means, that certain instruments are not to rest on parol testimony only, and it was not intended to touch those which were already authenticated by a ceremony of a higher nature than a signature or a mark." See *Ellis v. Smith*, 1 Ves. Jun., 10; *Lemayne v. Stanley*, 3 Lev., 1; *Warneford v. Warneford*, 2 Strange, 764; *Cooch v. Goodman*, 2 Adol. & Ell., N. S., 580; *Aveline v. Whisson*, 1 M. & G., 801; *Gryle v. Gryle*, 2 Atk., 177; *Smith v. Evans*, 1 Wils., 313; *Wright v. Wakeford*, 17 Ves., 454.

¹ *Jacobs v. Peterborough, etc.*, R.R., 8 Cush., 223. ² *Selby v. Selby*, *supra*.

³ *Wilson v. Beddard*, 12 Sim., 28; *Taylor v. Denning*, 3 N. & P., 228; *Jackson v. Van Busen*, 5 Johns., 144.

⁴ *Salmon Falls Manf. Co. v. Goddard*, 14 How., 446; *Phillimore v. Barry*, 1 Camp., 513; *Barry v. Coombe*, 1 Pet., 640.

⁵ *Lucas v. James*, 7 Hare, 410, 419.

⁶ *Saunderson v. Jackson*, 2 B. & P., 239; 1 Mad. Ch., 376; *Boardman v. Spooner*, 13 Allen, 333.

⁷ *Schneider v. Norris*, 2 M. & S., 286. The owner of land, who had authorized real estate agents to sell it, indorsed on one of their business cards a brief description of the land, together with his terms, which he signed. On the same card, an individual wishing to purchase, wrote, "your terms are accepted," and signed it. Held that the memorandum was sufficient. *Cossett v. Hobbs*, 56 Ill., 231.

is not necessary that the identical instrument should be signed. If it is acknowledged by any other instrument duly signed, it is sufficient.¹ An indorsement, with the defendant's signature thereto, on the back of the contract, is sufficient to take the case out of the statute, although made at a subsequent period ; it being a complete recognition of the contract.² When the memorandum, after being signed by the party, is altered by him by the introduction of other words, he need not again sign it, if it is evident that he intended that his signature should authenticate the writing in its changed form.³ But a writing signed by a party and kept in his possession without delivery to the other party, is not a compliance with the statute ; it being in the power of the party to destroy the writing and prevent its being used as evidence of the contract.⁴ When the statute provides that the note or memorandum shall be *subscribed* by the person to be charged, his name must be signed at the end of the memorandum ;⁵ and there must be an actual manual subscription ; a printed name is not sufficient.⁶

§ 241. *Intention to affix signature.*—The authorities are not uniform as to how far the writing by the party of his name must be with the intent of signing. It has been

¹ Welford v. Beazely, 3 Atk., 503.

² Gale v. Nixon, 6 Cowen, 445.

³ Bluck v. Gombertz, 14 Eng. L. & Eq., 345.

⁴ Johnson v. Brooks, 31 Miss., 17. Where a party signs an agreement to do certain things after the other shall have performed conditions which are precedent, and the conditions have been fulfilled, the party who signed the agreement will be compelled to perform. Laning v. Cole, 4 N. J. Eq. (3 Green), 229.

⁵ Davis v. Shields, 26 Wend., 341, reversing S. C., 24 Ib., 322 ; James v. Patten, 6 N. Y., 9, reversing, S. C., 8 Barb., 344 ; De Beerski v. Paige, 47 Barb., 172.

⁶ Vielle v. Osgood, 8 Barb., 130. In the following States, the statute requires the note or memorandum to be subscribed by the party : Alabama, Code of 1867, Sec. 1862 ; California, Code, Sec. 1624 ; Michigan, Comp. Laws of 1871, Ch. 166, Sec. 8 ; Minnesota, Sts. of 1873, Vol. 1, pp. 691, 692, Secs. 6, 12 ; New York, Rev. Sts., 6th Ed., Vol. 3, pp. 141, 142 ; Oregon, Gen. Laws, 1872, Ch. 8, Sec. 775 ; Wisconsin, Sts. of 1871, Vol. 2, Ch. 106, Sec. 8. In New York, an agreement for the sale of goods of the value of fifty dollars or more, must be signed by both of the parties. Justice v. Lang, 2 Robertson, 333. The intention of the statute is, that if the contract be in writing both parties shall subscribe it ; that if there is no contract in writing, one party shall deliver, and the other, not only agree to accept, but actually receive, a part of the property sold ; or that the buyer shall pay, and the seller receive, some part of the purchase money, in order to make the contract effectual.

held that such a writing with the intent of afterward signing, is sufficient; as where a person writes his name at the beginning, and leaves a place for his signature at the bottom, and thus shows "that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed."¹ But where the party to be bound signed as a witness, it was held to amount to a signature.² On the other hand, the court of Queen's bench decided that a person signing as a witness would not be holden as a party, or as agent of a party.³ So, where the names were written at the commencement of the writing which terminated with the words, "as witness our hands," without any signatures, it was held by the English court of common pleas, not to be sufficient, for the reason that the concluding words showed an evident intention that the agreement should be signed at the foot.⁴ The last case mentioned, indicates the ground upon which every similar case must be determined, to wit, the intention of the party when he put his name to the paper. Of course, when the name of the party is introduced in the body of the instrument as one of the terms of the agreement—as in the memorandum for a lease, in the words "the rent to be paid to A."—it does not amount to a signature by A.⁵

§ 242. *Signature of agent*.—As the statute provides that the memorandum must be signed either by the party or by "some person thereunto by him lawfully authorized," it may be asked, 1st, who is competent thus to act for another; and 2d, how is the person to be clothed with the

¹ *Saunderson v. Jackson*, 2 B. & P., 239, per Lord Eldon; *Knight v. Crookford*, 1 Esp., 190.

² *Welford v. Beazely*, 3 Atk., 503; *Coles v. Trecothick*, 9 Ves., 234, 251.

³ *Gosbell v. Archer*, 2 Adol. & Ell., 500; doubting *Coles v. Trecothick*, *supra*.

⁴ *Hubert v. Treherne*, 3 Man. & Gr., 743; *Hubert v. Turner*, 4 Scott, N. R., 486.

⁵ *Stokes v. Moore*, 1 Cox, 219; *Hawkins v. Holmes*, 1 P. Wms., 770; *Fry on Specif. Perform.*, 161, 162.

requisite authority? The agent must be some third person. One of the parties to the agreement cannot constitute himself the agent of the other, even with the latter's consent. Accordingly, where the seller wrote the memorandum at the dictation of the buyer, the latter was held not to be bound by it.¹ Although the agent of the seller cannot become the agent of the purchaser in the same transaction, or an agent employed to buy, become the agent of the vendor;² yet the same individual may act as the agent of both parties. Thus, the memorandum of a broker and the entry of an auctioneer in his book of sales are sufficient to constitute a binding agreement; the broker and auctioneer being regarded as agents authorized by both parties.³ It

¹ Wright v. Dannah, 2 Camp., 203; and see Farebrother v. Simmons, 5 B. & A., 33; Raynor v. Linthorne, 1 R. & M., 325; Cooper v. Smith, 15 East., 103; Bailey v. Ogden, 3 Johns, 417. A contract for the sale of land entered into by the joint owners of the property, and signed by only one of such joint owners, cannot be enforced against them. McIntire v. Bowden, 61 Me., 153; Johnson v. Brooks, 31 Miss., 17.

² Lees v. Nuttall, 1 R. & M., 53; Lowther v. Lowther, 13 Ves., 103; Reed v. Norris, 2 M. & C., 374; Copeland v. Mere. Ins. Co., 6 Pick., 198; Reed v. Warner, 5 Paige Ch., 650; Bartholomew v. Leach, 7 Watts, 472; N. Y. Centr. Ins. Co. v. National Protection Ins. Co., 20 Barb., 470. "The rule seems to be founded on the danger of imposition in such cases, and the presumption which a court of equity indulges of the existence of fraud which is inaccessible to the eye of the court; and consequently, in equity, such agreements are regarded as constructively fraudulent." Story on Agency, Sec. 211, note 2.

³ Where a sale of real estate to pay debts is made at auction by an administrator, by authority of the court, he is not the agent of the purchaser authorized by him to make and sign the memorandum. Smith v. Arnold, 5 Mason, 414. "It is said that this is the case of a judicial sale, and such sales have been held not to be within the statute of frauds. The cases alluded to are sales of a very different sort from that before the court. In sales directed by the court of chancery, the whole business is transacted by a public officer under the guidance and superintendence of the court itself. Even after the sale is made, it is not final until a report is made to the court, and it is approved and confirmed. Either party may object to the report, and the purchaser himself, who becomes a party to the sale, may appear before the court, and, if any mistake has occurred, may have it corrected. He therefore becomes a party in interest, and may represent and defend his own interests; and, if he acquiesces in the report, he is deemed to adopt it, and is bound by the decree of the court confirming the sale. He may be compelled, by process of the court, to comply with the terms of the contract; so that the whole proceedings, from the beginning to the end, are under the guidance and direction of the court, and the case does not fall within the mischief supposed by the statute of frauds. In the case of an administrator, the authority to sell is indeed granted by a court of law; but the court, when it has once authorized the administrator to sell, is *functus officio*. The proceedings of the administrator never come before the court for examination or confirmation. They are matters *in pais*, over which the court has no control. The

has been held that a member of a corporation may sign for the corporation.¹ So, the record of the votes of a corporation, signed by their clerk, to employ another at a given salary, constitutes a sufficient memorandum to take the agreement out of the statute of frauds.² And a partner may sign for the firm;³ each partner being deemed, in whatever relates to partnership business, the agent of the rest.

§ 243. *Agent how appointed.*—The expression in the statute, “or by some person thereunto by him lawfully authorized,” means not that such person shall be specifically delegated to do that particular thing, but that he shall be clothed with full authority, not merely to conduct the negotiation, but to conclude a binding agreement by signing it in behalf of his principal; and a general agency may empower him to do this.⁴ The agency must, however, be clearly shown.⁵ Where the memorandum was signed by an

administrator is merely accountable to the court of probate for the proceeds acquired by the sale, in the same manner as for any other assets. But whether he has acted regularly or irregularly in the sale is not matter into which there is any inquiry by the court granting the license, or by the court of probate having jurisdiction over the administration of the estate; so that the present case is not a judicial sale in any just sense, but the execution of a ministerial authority.” *Ib.*, per Story, J. The foregoing remarks, of course, have no application where sales of real estate by administrators are throughout under the guidance and control of the court. In Alabama sales of land by an executor or administrator, under the order of the probate court, fall within the description of judicial sales. The sales are required to be reported to the court, which then confirms or sets them aside, and not until the confirmation can the purchaser acquire a complete title. *Hutton v. Williams*, 35 Ala., 503, per Walker, C. J. It is the same in some of the other States.

¹ *Stoddert v. Vestry of Port Tobacco Parish*, 2 Gill & Johns, 227.

² *Tufts v. Plymouth Gold Mining Co.*, 14 Allen, 407; *Chase v. City of Lowell*, 7 Gray, 33; *Johnson v. Trinity Church Soc.*, 11 Allen, 123.

³ *Kyle v. Roberts*, 6 Leigh., 445.

⁴ “By the term general agent, is meant, first, a person who is appointed by the principal to transact all his business of a particular kind; or, secondly, an agent who is himself engaged in a particular trade or business, and who is employed by his principal to do certain acts for him in the course of that trade or business. In both of these cases the agent will, if there be no limitation of his authority known to third parties, be taken, as to them, to be a general agent, and will therefore have the power to bind his principal by all contracts entered into with them which are within the scope of his ordinary employment.” *Russell on Factors and Brokers*, p. 75.

• ⁵ *Blore v. Sutton*, 3 Mer., 237; *Ridgway v. Wharton*, 3 De G. M. & G., 677; *S. C.*, 6 House of Lds., 238; *Firth v. Greenwood*, 1 Jur. N. S., 806; *Roby v. Cossitt*, 78 Ill., 638.

agent acting under a general authority, and below his signature—were these words, “As witness our hands,” it was held that as it appeared from this that the defendants intended to sign it themselves, they were not bound.¹ When the mode of appointing the agent is not directed by statute, the appointment may be by parol.² It is sufficient that there be satisfactory proof that the principal employed the agent, and that the agent undertook the trust; and the agency may be inferred from letters, or other acts and circumstances, or from the relations of the parties, and the nature of the employment, without evidence of an express appointment.³ Proof of assent, on the part of the principal,

¹ Hubert v. Turner, 4 Scott, N. R., 486.

² Waller v. Hendon, 5 Vin. Abr., 524, Pl. 45; Coles v. Trecothick, 9 Ves., 234, 250; Clinan v. Cooke, 1 Sch. & Lef., 22; Barry v. Lord Barrymore, Ib., 28; Talbot v. Bowen, 1 A. K. Marsh, 437; Merritt v. Clason, 12 Johns, 102; McWhorter v. McMahan, 10 Paige Ch., 386; Irvin v. Thompson, 4 Bibb., 295; Shaw v. Nudd, 8 Pick., 9; Hawkins v. Chace, 19 Ib., 502; Mortimer v. Cornwell, 1 Hoffm. Ch., 351; McConnel v. Brillhart, 17 Ill., 354; Taylor v. Merrill, 55 Ib., 52; Dykers v. Townsend, 24 N. Y., 57; Moody v. Smith, 70 Ib., 598. The common law rule that an authority, to execute a deed or instrument under seal, must be conferred by an instrument of equal dignity and solemnity, is said to have been relaxed in most of the States, as follows: “If a conveyance or any act is required to be by deed, the authority of the attorney or agent to execute it must be conferred by deed. But if the instrument or act would be effectual without a seal, the addition of a seal will not render an authority under seal necessary, and, if executed under a parol authority, or subsequently ratified and adopted by parol, the instrument or act will be valid and binding on the principal.” Paige, J., in Worrall v. Munn, 5 N. Y., 229. And see White v. Cuyler, 6 Term R., 176; Bank of Columbia v. Patterson, 7 Cranch, 299, 307; Randall v. Van Vechten, 19 Johns, 60; Hanford v. McNair, 9 Wend., 54; Evans v. Wells, 22 Wend., 340, 341; Lawrence v. Taylor, 5 Hill, 113. In the following States the agent must be authorized in writing: California, Code, Sec. 1741; Illinois, Sts., Ed. of 1874, Vol. 3, p. 210, Secs. 1, 2; Michigan, Comp. Laws, 1871, Vol. 2, p. 1455, Ch. 166, Sec. 8; Nebraska, Genl. Sts., 1873, p. 392, Ch. 25; Morgan v. Bergen, 3 Neb., 309; New Hampshire, Genl. Sts., 1867, Ch. 201, Sec. 12. In Pennsylvania, under the statute of that State, no interest, at law or in equity, can be contracted for by an agent, unless he is authorized by writing. Parish v. Koons, Parson’s Sel. Cas., 78; Horne v. Fricke, 6 Serg. & Rawle, 90; Meredith v. Macoss, 1 Yeates, 200; Nicholson v. Mifflin, Ib., 200; Twitchell v. Philadelphia, 33 Pa. St., 212. The same construction of the statute, with reference to the appointment of agents by parol, applies to agents for the sale of both real and personal property. McComb v. Wright, 4 Johns Ch., 659.

³ Sharp v. Milligan, 22 Beav., 606; Dyas v. Cruise, 2 Jon. & Lat., 461. When written authority to an agent to make a contract for the sale of real estate in behalf of his principal is relied on, the rule of construction is, that all written powers, such as letters of attorney, or letters of instruction, must receive a strict interpretation; the authority never being extended beyond that which is given in terms, or is absolutely necessary for carrying the authority so given into effect. Bissell v. Terry, 69 Ill., 184.

that the clerk of an agent shall act as agent, will constitute him such.¹ But a solicitor employed in a marriage treaty, who drew up a memorandum of the arrangement agreed upon, was held not to be an agent lawfully authorized to bind the parties, so as to make the insertion by him of their names in the memorandum a signature within the statute.²

§ 244. *Sanction by principal of agent's act.*—The acts of an agent done without authority, may afterward be ratified and confirmed by his principal; such adoptive authority, relating back to the time of the transaction, and being deemed in law the same for all purposes, as if it had been given before.³ There need not have been an express act of ratification in order to compel the principal to perform the contract. But his subsequent assent may be inferred from circumstances which the law considers equivalent to an express ratification; as where the alleged principal takes the benefit of the contract, or acquiesces in it for a length of time beyond what is reasonably required for the expression of dissent.⁴ If the principal, although he

¹ Coles v. Trecothick, 9 Ves., 234.

² Lord Glengal v. Barnard, 1 Keen, 769. And see De Biel v. Thomson, 3 Beav., 469.

³ Ridgway v. Wharton, *supra*; Clark v. Riemsdyk, 9 Cranch, 346; Lawrence v. Taylor, 5 Hill, 107. In Maclean v. Dunn, 4 Bing., 722, Best, J., said: "It has been argued that the subsequent adoption of the contract by Dunn, will not take this case out of the operation of the statute of frauds; and it has been insisted that the agent should have his authority at the time the contract is entered into. If such had been the intention of the Legislature, it would have been expressed more clearly. But the statute only requires some note or memorandum in writing to be signed by the party to be charged, or his agent thereunto lawfully authorized, leaving us to the rules of the common law as to the mode in which the agent is to receive his authority. Now in all other cases, a subsequent sanction is considered the same thing in effect, as assent at the time. And, in my opinion, the subsequent sanction of a contract signed by an agent, takes it out of the operation of the statute more satisfactorily than an authority given beforehand. Where the authority is given beforehand, the party must trust to his agent. If it be given subsequently to the contract, the party knows that all has been done according to his wishes."

⁴ Bigg v. Strong, Week. Rep., 1857-1858, 173. An offer in writing to take a lease of a theatre, signed by the proposed lessees, and attested by the lessor's agent, but not naming the lessor, and only addressed to him as "Sir," followed by an acceptance in writing by the agent addressed to and received by the proposed lessees, but not naming the lessor, or signed by them or referred to in any other writing, is not a memorandum of agreement within the statute of frauds so as to entitle the lessor to have the same specifically enforced. Williams v. Jordan, L. R. 6, Ch. D. 517; referring to Warner v. Willington, 3 Drew, 523.

did not authorize the agent to act for him, represented to the other party to the contract that he had done so, he will be estopped from afterward denying it. But a ratification will not be presumed from vague expressions to a third person.¹ The revocation of the agent's authority may of course be proved by parol.²

§ 245. *Signature by agent how made.*—With regard to the manner of the agent's signing, it does not seem to be necessary that the name of the principal should anywhere appear in the memorandum; the statute being complied with, if the writing is signed by the agent in his own name.³ Where an agent, in Massachusetts, of coal dealers

¹ Ridgway v. Wharton, *supra*.

² Manser v. Back, 6 Hare, 443. If the agent sells, and does not sign a note or memorandum in writing, the vendor has the same *locus penitentiae* as if he himself verbally agrees to sell; for he may revoke the authority of the agent at any time before the agreement is executed according to the statute. So an agent to purchase, must have authority to bind the purchaser by signing the agreement, and his authority may be revoked before the contract is reduced to writing and signed. Yerby v. Grigsby, 9 Leigh, 387.

³ Yerby v. Grigsby, *supra*; Stackpole v. Arnold, 11 Mass., 27; Rice v. Gove, 22 Pick., 158; Minard v. Mead, 7 Wend., 68; Spencer v. Field, 10 Ib., 87; Pentz v. Stanton, Ib., 271; Ford v. Williams, 21 How., 287; Dykers v. Townsend, 24 N. Y., 57; Coleman v. First Nat. Bank of Elmira, 53 N. Y., 393; Eastern R.R. Co. v. Benedict, 5 Gray, 566; Walsh v. Barton, 24 Ohio St., 28; White v. Proctor, 4 Taunt., 209. It is doubtless somewhat difficult to reconcile the doctrine here stated, with the rule that parol evidence is inadmissible to change, enlarge, or vary a written contract, and the argument upon which it is supported, savors of subtlety and refinement. In some of the earlier cases, the doctrine was stated with the qualification, that it applied when it could be collected from the whole instrument, that the intention was to bind the principal. But it will appear, from an examination of the cases cited, that this qualification is no longer regarded as an essential part of the doctrine. Whatever ground there may have been originally, to question the legal soundness of the doctrine referred to, it is now too firmly established to be overthrown. But the vendor in a sealed executory agreement *inter partes*, for the sale of land, cannot enforce it as the simple contract of a person not mentioned in, or a party to, the instrument, on proof that the vendee named therein, and who signed and sealed it as his contract, had oral authority from such third person to enter into the contract of purchase, and acted as his agent in the transaction, especially when it appears that the vendor has remained in possession of the land, and no act of ratification by the undisclosed principal is shown. It has been held that when a sealed contract has been executed in such form that it is, in law, the contract of the agent, and not of the principal, but the principal's interest in the contract appears upon its face, and he has received the benefit of performance by the other party, and has ratified and confirmed it by acts *in pais*, and the contract is one which would have been valid without a seal, the principal may be made liable upon the promise contained in the instrument, which may be resorted to, to ascertain the terms of the agreement. Randall v. Van Vechten, 19 Johns, 60; Du Bois v. Del. & Hud. Canal Co., 4 Wend., 285; Lawrence v. Taylor, 5 Hill, 107.

residing in Pennsylvania, wrote a letter to the buyer stating an agreement to sell, the price, quantities, and description of the different kinds of coal sold, the place where it was to be delivered, and the time of payment, without naming his principals, or expressing in terms that he acted as their agent, alluding to them as "our people," it was held a sufficient memorandum to meet the requirements of the statute.¹

§ 246. *Signature of person conducting public sale.*—The auctioneer is a competent agent to sign for the purchaser either of land or goods sold at auction; and the insertion of the purchaser's name, as the highest bidder, in the memorandum of sale by the auctioneer, is a signing within the requirements of the statute.² And the clerk of the auctioneer, who enters the name of the purchaser at the sale in a book, is an agent for the purchaser.³ But although, when

¹ Williams v. Bacon, 2 Gray, 387.

² Macomb v. Wright, 4 Johns Ch., 659; Hinde v. Whitehouse, 7 East., 558; Stansfield v. Johnson, 1 Esp., 101; Walker v. Constable, 1 Bos. & Pull., 306; Cordon v. Sims, 2 McCord Ch., 164; Adams v. McMillan, 7 Porter, 73; Anderson v. Chick, Bailey Eq., 118; Endicott v. Perry, 14 Sm. & Marsh., 157; White v. Crew, 16 Ga., 416. The memorandum of an auctioneer, in order to be a valid act, must have been made within such a time, as shows it to have been a part of the transaction. White v. Watkins, 23 Me., 423. It is said that it was not decided in Maine and Massachusetts, that in the sale of real estate at auction, the auctioneer is to be deemed the agent of the purchaser, and as such competent to charge him by his signature, until the year 1826. Cleaves v. Foss, 4 Me., 1. In England, after much fluctuation and doubt, it was settled that an auctioneer is to be deemed the agent of both parties in respect to the sale, and authorized to make a memorandum for both. The doctrine was first adopted by Lord Mansfield in Simon v. Motivos, 3 Burr., 1921, and subsequently followed with hesitation. It has been disapproved by high authority. In Smith v. Arnold, 5 Mason, 414, Judge Story said: "It appears to me, speaking with all due respect, to have done much to destroy the salutary operation of the statute of frauds. By the common law, if an agent is to execute a deed for his principal, his authority must be of as high a nature. It must be by deed. By analogy, it would have seemed convenient, if not indispensable, to have held, that where the statute to prevent frauds and perjuries required a contract to be in writing, if executed by an agent, his authority should be in writing also. That the auctioneer is agent of the seller, is clear. That he is also agent of the buyer, is not so very clear, and is a conclusion founded on somewhat artificial reasoning. But the doctrine is now established; and the best reason in support of it, is, that he is deemed a disinterested person, having no motive to misstate the bargain, and enjoying equally the confidence of both parties."

³ Bird v. Boulter, 4 B. & Ad., 443; Gosbell v. Archer, 2 Adol. & Ell., 500; Frost v. Hill, 3 Wend., 386; First Baptist Church of Ithaca v. Bigelow, 16 lb., 28; Gill v. Bicknell, 2 Cush., 358; Hart v. Woods, 7 Blackf., 568; Doty v. Alder, 15 Ill., 407. But, in an early case in South Carolina, it was held that an auc-

a sale is had at auction, the auctioneer, from the necessity of the case, is the agent, not only of the vendor, but also of the purchaser, yet, when the necessity does not exist, as in a subsequent purchase in private from the auctioneer, no such agency arises.¹ Where a public sale of land is made by order of court, the officer making the sale is the agent of both parties as well as of the court, and the entry of the officer on his sales book is a sufficient memorandum.² But not an entry made by a person employed by the officer to auction off the property for him.³ A sheriff's return to a writ of *fieri facias* reporting a sale of real estate, or his execution of a deed to the purchaser, are either of them a sufficient memorandum. It is not necessary that the return should be indorsed on the writ, or the deed executed at the time of the sale.⁴ Where a broker who acts for the buyer and seller, makes an entry of the transaction in his book, and delivers to them the bought and sold notes transcribed therefrom, the contract of sale is binding on each.⁵ When an auctioneer makes a pencil memorandum on a loose slip of paper at the moment of sale, and shortly afterward enters the sale in his sales book, the latter is regarded as the true entry.⁶ When a proper entry is made by the auctioneer at

tioneer's clerk is not an agent within the statute whose signature will give validity to a contract of sale of real estate at auction, unless the authority of the party has been specially obtained for that purpose, or he has assented to it. *Meadows v. Meadows*, 3 McCord, 458. And see *Entz v. Mills*, 1 McMullan, 453; *Christie v. Simpson*, 1 Rich., 407; *Carmack v. Masterson*, 3 Stew. & Port., 411.

¹ *Emerson v. Heelis*, 2 Taunt., 38; *Kemeys v. Proctor*, 3 V. & B., 57; S. C., 1 J. & W., 350; *Buckmaster v. Harrop*, 7 Ves., 341; 13 Ib., 456; *Kenworthy v. Schofield*, 2 B. & C., 945; *Bartlett v. Purnell*, 4 A. & E., 792.

² *Jenkins v. Hogg*, 2 Const. R., 821. ³ *Hutton v. Williams*, 35 Ala., 503.

⁴ *Barney v. Patterson*, 6 Har. & Johns, 182; *Fenwick v. Floyd*, 1 Har. & Gill, 172; *Christie v. Simpson*, 1 Rich., 407; *Elfe v. Gadsden*, 2 Ib., 372; *Nichol v. Ridley*, 5 Yerg., 63. See *Robinson v. Garth*, 6 Ala., 204; *Ennis v. Waller*, 3 Blackf., 472.

⁵ *Rucker v. Cammeyer*, 1 Esp. N. P., 105; *Hicks v. Hankin*, 4 Ib., 114; *Champion v. Plummer*, 1 N. R., 253; *Merritt v. Clason*, 12 Johns, 102; *Clason v. Bailey*, 14 Ib., 484. Where in a verbal agreement for the purchase of goods, it was stipulated that they were to be subject to the buyer's approval, and the broker's sale book omitted that part of the bargain, it was held that there was no sufficient memorandum to take the case out of the statute. *Boardman v. Spooner*, 13 Allen, 353.

⁶ *Episcopal Church of Macon v. Wiley*, 2 Hill Ch., 584.

the commencement of the sale which is adjourned to, and continues on a second day, there need not be a repetition of the entry.¹

§ 247. *Entry to be made in case of sale at auction.*—The memorandum of the auctioneer must refer to the conditions of sale, and state the material terms of the agreement.² At an auction sale of real estate subject to conditions, the auctioneer entered in his sale book the names of the vendor and purchaser, the subject matter of the sale, and the amount of the purchase money, but omitted in the entry to embody or make any reference to the conditions of sale. It was held that there was not a sufficient written contract within the statute of frauds, and specific performance was refused as against the purchaser.³ On a sale of real estate at auction, an entry which did not disclose the name of the vendor was held fatally defective.⁴ Upon a sale at auction of real estate in lots, the particulars stated that the sale was by direction of the proprietor. But the name of the vendor did not appear. A memorandum indorsed on a copy of the particulars was signed by the purchaser of one of the lots, and by the auctioneer in behalf of the vendor. It was held that the vendor was sufficiently described to satisfy the requirements of the statute of frauds, and specific performance of the contract was decreed at the suit of the purchaser.⁵ Where a contract is made by a broker for goods expected from abroad, and the purchaser stipulates for certain conditions, which conditions the broker omits in making the entry in his sale book, and no sale note is delivered, the seller is not bound, although the conditions were for the benefit of the buyer, and he is willing to waive them.⁶ Under the New York revised statutes, a mere memoran-

¹ Price v. Durin, 56 Barb., 647. See Hicks v. Whitmore, 12 Wend., 548.

² Morton v. Dean, 13 Metc., 385; Kenworthy v. Scofield, 2 B. & C., 945; Peirce v. Corf, L. R. 9, Q. B. 210.

³ Rishton v. Whetmore, L. R. 8, Ch. D. 467.

⁴ Nichols v. Johnson, 10 Conn., 192; Sherburne v. Shaw, 1 N. H., 157.

⁵ Sale v. Lambert, L. R. 18, Eq. 1.

⁶ Davis v. Shields, 26 Wend., 341.

dum, in the auctioneer's book, made by him, or his clerk under his direction, specifying the property sold, the price, the terms of sale, and the names of vendor and purchaser, is not sufficient to make a valid and binding contract for the sale of land ; though the statute expressly declares it to be sufficient in relation to a sale of goods.¹ Where land is sold at auction, the auctioneer must reduce the contract to writing at the time of the sale, and subscribe it as the agent of the parties, or at least as the agent of the vendor.² The note or memorandum may consist of several papers so connected, physically or by internal reference, that there can be no uncertainty as to their meaning and effect when taken together. This connection cannot, however, as has already been stated, be shown by extrinsic evidence.³ Where, at the time of sale of real estate at auction, the auctioneer first read the printed advertisement of sale, and then read the terms of sale as written in his auction book, but the advertisement was not pasted on the auction book with the terms of sale there written, or in any way attached to the written terms of sale, and they did not refer to each other on their face, it was held not sufficient.⁴ Where a letter containing the terms of sale of real estate, written by the vendor and addressed to the auctioneer, was pinned by the latter on a page of his sales book, and the remaining entries relative to the sale were made by him on the same page of the book, and subscribed by him, it was held a sufficient memorandum within the statute.⁵ The same was held as to a memorandum made by an auctioneer at the time of the sale of land, containing the name of the vendor, the terms of sale, and a printed advertisement taken from a newspaper, and attached to the auctioneer's book of sales, showing where the land was, and of what it consisted, with the words in pen-

¹ *Coles v. Bowne*, 10 Paige Ch., 526. ² *Champlin v. Parish*, 11 Paige Ch., 405.

³ *Ante*, § 233.

⁴ *Mayer v. Adrian*, 77 N. C., 83.

⁵ *Tallman v. Franklin*, 14 N. Y., 584, *reversing* S. C., 3 Duer, 375.

cil, "1 lot cor. of Av. A, Wm. Irwin. 1 lot next adjoining, J. L. Pinckney"; subscribed by the auctioneer.¹

§ 248. *When the statute not a defence.*—There remain to be considered certain exceptions in which a court of equity will enforce parol contracts, notwithstanding the statute. These are: 1st, where a written agreement has been prevented by fraud; 2d, in case of part performance of the parol contract; and, 3d, where the defendant admits the agreement and does not set the statute up in defence.²

§ 249. *Fraud of defendant.*—If the reduction of the contract to writing was prevented by the fraud of one of the parties, specific performance will be decreed, upon proof of the parol agreement and of the fraud.³ "The rule that

¹ Pinckney v. Hagadorn, 1 Duer, 89. And see Price v. Durin, 56 Barb., 647, as to memorandum made by clerk of auctioneer on the sale of goods.

² Morse v. Merest, 6 Mad., 26; Ridgway v. Wharton, 3 De G. M. & G., 677; Lincoln v. Wright, 4 De G. & J., 16; Jenkins v. Eldredge, 3 Story, 181; Willink v. Vanderveer, 1 Barb., 599; Trapnall v. Brown, 19 Ark., 39; Shields v. Trammell, 1b., 51. *Contra*, Box v. Stanford, 13 Smed. & Marsh, 93. And see Glass v. Hulbert, 102 Mass., 38.

³ The principle upon which fraud takes a case out of the operation of the statute has been thus stated: "Upon the statute of frauds, though declaring that interests shall not be bound except by writing, cases in this court are perfectly familiar deciding that a fraudulent use shall not be made of that statute where this court has interfered against a party meaning to make it an instrument of fraud, and said he should not take advantage of his own fraud, even though the statute has declared that in case those circumstances do not exist, the instrument shall be absolutely void. One instance, is the case of instructions upon a treaty of marriage; the conveyance being absolute, but subject to an agreement for a defeasance, which, though not appearing by the contents of the conveyance, can be proved *aliunde*; and there are many other circumstances." Lord Eldon in Mestaer v. Gillespie, 11 Ves., 627, 628. In Pember v. Mathews, 1 Bro. C. C., 52, the plaintiff was permitted to prove by parol that, when the agreement was made, an undertaking was given by the assignee of the lease to the assignor, for indemnity against the rents and covenants; the court holding that "where the objection is taken before the party executes the agreement, and the other side promises to rectify it, it is to be considered a fraud on the party if such promise is not kept." See Clarke v. Grant, 14 Ves., 525; Colyer v. Clay, 7 Beav., 188. And where there was a parol agreement for the loan of money on a mortgage, an absolute conveyance from the mortgagor, and a defeasance from the mortgagee, and after the mortgagee had obtained the conveyance he refused to execute the defeasance, he was decreed to do so on the ground of fraud. 1 Eq., Cas. Abr. 20, Pl. 5; Walker v. Walker, 2 Atk., 98. So, if a will be obtained by a promise to dispose of the property in a particular way, the court will give effect to the verbal agreement by raising a trust on the property devised or bequeathed by the will. Podmore v. Gunning, 7 Sim., 644; Chester v. Urwick, 23 Beav., 407. But where it is agreed by parol between the parties, that the contract shall be reduced to writing, a refusal to sign a written agreement is not a fraud of which the court can take cognizance. Whitechurch v. Bevis, 2 Bro. C. C., 565; though it was formerly held otherwise. Leake v. Morris, 1 Dick., 14; Hollis v. Whiteing, 1 Vern., 151; Deane v. Izard, 1b., 159.

fraud takes the case out of the statute is too well settled to admit of doubt ; and for the purpose of showing that fraud has been committed, or is being attempted, parol evidence has always been held to be admissible. The difficulty has been, in determining what amounted to fraud in the particular case ; and to this difficulty is referable those conflicts of opinion which seem occasionally to have trenched upon the rule itself. The rule, however, is universally acknowledged, and there is no case in which the conduct of the defendant was held to be fraudulent that he has been allowed to shelter himself behind the statute.”¹

§ 250. *When trust may be shown by parol.*—The provisions of the statute of frauds do not relate to implied trusts, or those which are raised or created by operation of law, and not from the contracts of the parties.² A trust results by implication of law : first, where the purchaser has paid the price with his money, but taken the conveyance in the name of another ; or, where he has paid with the money of another, and taken the conveyance in his own name ; second, where a trust has been declared of but part of the estate, from which the law implies an intent to reserve the beneficial ownership of the residue ; and, third, where there has been a plain fraud.³ In such cases parol evidence is admissible to establish the collateral fact from

¹ Cope, J., in *Hidden v. Jordan*, 21 Cal., 92. Equity will enforce a parol agreement for a joint interest in land, at the instance of a party to it who has fulfilled his part by full payment, and where it may be inferred that fraud would result from a refusal to decree specific performance. *Fannin v. McMullan*, 2 Abb. Pr. N. S., 224 ; *Ryan v. Dox*, 34 N. Y., 307 ; 36 *Ib.*, 511. Where two parties entered into an agreement for the purchase of a parcel of land, each to furnish one moiety of the purchase money, but one of the parties to enter the land in his own name, and hold the title to one-half interest in trust for the other, it was held that the agreement was not within the statute of frauds, but that it could be enforced in equity, if the party seeking to enforce it had carried out in good faith his part of the contract. *Nelson v. Worrall*, 20 Iowa, 469.

² *Whiting v. Gould*, 2 Wis., 552.

³ *Lloyd v. Spillet*, 2 Atk., 148 ; *Crop v. Norton*, 9 Mod., 233 ; *Dale v. Hamilton*, 5 Hare, 369 ; *Wray v. Steele*, 2 V. & B., 388 ; *Benbow v. Townsend*, 1 M. & K., 506 ; *Kisler v. Kisler*, 2 Watts, 323 ; *Larkins v. Rhodes*, 5 Porter, 195 ; *Brothers v. Porter*, 6 B. Mon., 106 ; *Botsford v. Burr*, 2 Johns Ch., 405 ; *Rogers v. Murray*, 3 Paige Ch., 390 ; *Ross v. Hegeman*, 2 Edwards Ch., 373 ; *Smith v. Burnham*, 3 Sumner, 435 ; *Williams v. Brown*, 14 Ill., 260 ; *Buck v. Swazey*, 35 Me., 41 ; *Livermore v. Aldrich*, 5 Cush., 435.

which a trust may legally result.¹ If real estate is conveyed to A., and the purchase money is paid by B., A. holds the land in trust for B. But if, in such case, B. pays only a part of the purchase money, and there is no agreement between A. and B., there is a resulting trust in favor of B. for an interest in the land proportioned to the amount of purchase money paid by him. In the latter case, however, a parol agreement may be shown, which shall entitle B. to the entire estate in the land.² Where the plaintiff and defendant verbally agreed to purchase a farm on their joint account, and the plaintiff paid for his share, but the defendant procured a conveyance of it to himself, it was held that the plaintiff was entitled to an undivided half of the farm, as a resulting trust.³ In all cases of fraud, and where transactions have been carried on *mala fide*, there is a resulting trust by operation of law. In an early case in Georgia, the court said: "We recognize the doctrine then, that a court of equity will not permit the statute of frauds to be set up as a defence by a party infected with fraud; and that parol trusts of real estate may be established in direct contradiction to the statute, on the ground of fraud; and that whenever a case of fraud is

¹ Parol evidence is admissible to show an implied or resulting trust in the purchase of real estate, growing out of the relation in which the parties stood toward each other as principal and agent, and from the fact that the only consideration advanced in payment for the land was paid by the alleged principal. *Church v. Sterling*, 16 Conn., 388.

² *Hidden v. Jordan*, 21 Cal., 92. A person intending to make a donation to another, and who clearly declares his purpose, and transfers the title, need not necessarily part with the possession, provided he declares himself, in proper form, to be a trustee holding possession for the donee. *Estate of Webb*, 49 Cal., 541. "It is certainly true that a court of equity will lend no assistance toward perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding, so long as it remains executory. But it is equally true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery." *Stone v. Hackett*, 12 Gray, 227, per Bigelow, J. And see *Kekewich v. Manning*, 1 De G. M. & G., 176; *Jones v. Lock*, L. R. 1, Ch. 25; *Wason v. Colburn*, 99 Mass., 342.

³ *Traphagen v. Burt*, 67 N. Y., 30. And see *Chester v. Dickerson*, 54 N. Y., 1.

made by the bill, parol evidence will be received for the purpose of sustaining the case, even though the effect of such evidence be to alter or vary a written instrument, and although the benefit of the statute be insisted on by the defendant."¹

§ 251. *Ground on which parol trust upheld.*—A trust may arise *ex maleficio*, in which equity turns the fraudulent procurer of the legal title into a trustee to get at him; and such a trust may be raised from the surreptitious procurement of a devise.² Equity does not intervene to uphold or enforce a parol trust, but to relieve against the fraud which has been perpetrated, by raising an implied trust; and it will treat the person who perpetrated the fraud as a trustee, not by virtue of the parol agreement, but as a trustee *ex maleficio* on account of the fraud.³ Where A., having a contract for the purchase of land, agrees by parol with B. that he shall pay the purchase money and hold the land as security for the amount advanced, A., on repaying B. the money, is entitled to a conveyance.⁴ C. purchased land, and borrowed money to pay the purchase price, verbally agreeing with the lender to execute a mortgage thereon, to secure such money; but, on receiving the deed, conveyed the property to his, C.'s, wife, she knowing of such agreement. Held, that the agreement was without the statute, and that the lender was entitled to have the

¹ *Miller v. Cotten*, 5 Ga., 346. But "unless there be something in the transaction more than is implied from the violation of a parol agreement, equity will not decree the purchaser to be a trustee. And the distinction is indispensable, otherwise there would be a repeal of the statute, under the pretence of preventing fraud, by decreeing an express trust, which would be introductive of the very evils the statute was designed to prevent." *McCulloch v. Cowher*, 5 Watts & Serg., 427, per Woodward, J.

² *Hoge v. Hoge*, 1 Watts, 163; *Hunt v. Turner*, 9 Texas, 385; *Mundorff v. Howard*, 4 Md., 459.

³ *Wheeler v. Reynolds*, 66 N. Y., 227.

⁴ *Cousins v. Wall*, 3 Jones Eq., 43; *Coninger v. Summit*, 2 Ib., 513. See *Hodges v. Howard*, 5 R. I., 149; *Cameron v. Ward*, 8 Ga., 245; *Jones v. M'Dougal*, 32 Miss., 179; *Hidden v. Jordan*, *supra*. The statute requiring contracts for leasing or agreeing to lease lands to be in writing, does not apply when one agrees by parol to take a lease of land for another, but takes the land in his own name. In such case, equity will enforce the agreement and compel him to make title to the principal. *Hargrave v. King*, 5 Ired. Eq., 430.

mortgage executed, regardless of the fact that he took C.'s note for part of the purchase money.¹ A. having a contract for the purchase of land from B., and having occupied the land for several years, and made valuable improvements on it under the contract, which had a year to run, proposed to C. that the latter should let him have the amount then due on the contract, and give him five years in which to repay the same with interest, taking a conveyance of the land from B. as security, and entering into a written contract with A. for the sale of the land to him upon repayment of the sum advanced, pursuant to the arrangement. C. accepted A.'s proposition, let him have the money, and took a conveyance of the land from B.; but afterward refused to carry out his agreement to give A. a contract of sale, denying that he ever made such an agreement, and claiming to hold the land absolutely. It was held that the statute did not prevent the enforcement of the parol agreement.²

¹ *Cole v. Cole*, 41 Md., 301. Although, where one person hears another bargain with a third person for an estate, and sees money paid out without making known his title, the rule of equity is, that he shall not be permitted to disturb such third person in the enjoyment of the estate, yet this rule does not apply to cases of parol contract, when all the parties fully understand the state of title. *Wilton v. Harwood*, 23 Me., 131.

² *McBurney v. Wellman*, 42 Barb., 390. Parol evidence is admissible to show the circumstances under which a deed was given, and the relation of the parties to it and to each other in respect to it. Where therefore A. undertook, as the agent of B., to sell certain real estate, and, to facilitate such sale, B. deeded the land to A., without the payment of any consideration by A., who took the conveyance as the agent of B., and having sold the land, refused to hand over the proceeds of the sale to B., it was held that the statute of frauds did not prevent B. from proving the nature and extent of A.'s agency. *Collins v. Tillou*, 26 Conn., 368. And the same was held where a deed absolute on its face was executed under a promise by the grantee that he would hold the land conveyed for the use of the heirs of the grantor. *Kennedy v. Kennedy*, 2 Ala., 571. See *Lynch v. Lynch*, 1 Paige Ch., 147; *Sweet v. Jacobs*, 6 Ib., 355; *Martin v. Martin*, 16 B. Mon., 8; *Blodgett v. Hildreth*, 103 Mass., 484. In *Hutchins v. Lee*, 1 Atk., 447, a bill was filed to set aside an assignment of a leasehold estate, and all other the estate and effects of the plaintiff, upon a suggestion that the estate was never intended as an absolute assignment for the benefit of the defendant, but made only to ease the plaintiff of the trouble and care of managing his own concerns at that time (being then under great infirmities of body and mind), and subject to a trust for the benefit of the plaintiff if he should afterward be in a capacity of taking care of his own affairs. The assignment was absolute in its terms. The lord chancellor held, that, although there cannot be a verbal declaration of a trust since the statute of 29 Chas. II., yet parol evidence is proper in avoidance of a fraud which the defendant intended to practice on the plaintiff

§ 252. *Fraud of purchaser at public sale.*—A parol agreement to purchase for the defendant in execution will not be enforced in equity, unless it is accompanied by circumstances of fraud, or has been made use of by the purchaser to obtain the property for an inadequate consideration, or to oppress the defendant; and this must be proved by the clearest evidence.¹ The fraud which will convert the purchaser at a sheriff's sale into a trustee *ex maleficio*, must have been fraud at the time of the sale.² A verbal agreement entered into by A. and B. with an execution debtor, whose land is about to be sold by the sheriff, to purchase it with their own funds and hold it for his benefit, is equivalent to a loan of money and a taking of the title as security for its repayment; or an agreement by one person to purchase land for the benefit of another, under circumstances which would amount to a fraud upon the latter, if the former were allowed to repudiate his promise, and therefore is not within the statute of frauds.³ A.'s

by attempting to deprive him of the benefit of the statute. A party cannot set up a parol trust when the design is to delay, hinder, or defraud creditors. *Murphy v. Hubert*, 16 Pa. St., 50; S. C., 7 Ib., 420; *Hills v. Elliott*, 12 Mass., 26.

¹ *Walker v. Hill*, 21 N. J. Eq., 191. In *Soggins v. Heard*, 31 Miss., 428, the court said: "It is not now an open question, that when a party agrees before the sale to purchase property about to be sold, under an execution against a party, and to give such party the benefit of the purchase, the agreement is binding and will be enforced. The defendant, upon the faith of such an agreement, may have ceased his efforts to raise the money for the purpose of paying off the execution, and thus preventing a sale of his property. It will not do to say that the party promising was moved merely by friendly or benevolent considerations, and may, therefore, at his option, decline a compliance with his agreement. Such considerations constitute the foundation of almost every trust, and the trustee should be held to account, as nearly as possible, in the same spirit in which he originally contracted. But it is said that the agreement, if in fact made, was void under the statute of frauds. The statute has reference alone to a sale of lands, and not to a contract to purchase by one person for the benefit of another."

² *Wheeler v. Reynolds*, 66 N. Y., 227

³ *Sandfoss v. Jones*, 35 Cal., 481. In *Keith v. Purvis*, 4 Dessaus Eq., 114, a creditor induced his debtor's agent not to bid at a sale of his debtor's land, by promising to give the debtor time to pay the debt, and then to reconvey the land. This agreement was disclosed at the sale and prevented other bids, whereby the creditor bought the land for one-third of its value, but afterward refusing to reconvey, the debtor filed a bill for relief. To this it was objected that the agreement was void by the statute of frauds, but the court held that if the agreement was void, the creditor must surrender his advantage under it, and be liable to make good the loss sustained by the adverse party from his conduct.

land having been sold for taxes and bought by B., it was verbally agreed between A. and B. that the latter, upon the payment by the former of the amount of his bid, with twenty-five per cent. interest thereon, would assign the certificate of said sale to A. A., relying upon B.'s promise, allowed the time for redemption to expire without redeeming, and B. having obtained a deed of the land from the auditor-general, refused to convey the land to A. upon his offering to fulfil his part of the agreement. Held, that a fraud had been perpetrated upon A., against which he was entitled to relief.¹

§ 253. *Fraudulent purchase of mortgaged property.*—Where it is verbally agreed between the vendor of land at a judicial sale and the purchaser, that the purchaser's rights shall be only those of a mortgagee, and he fraudulently violates the contract by obtaining an absolute deed to himself, and selling the land to a third person who has notice of the agreement, the purchaser and his vendee hold the title in trust for the original owner.² "But even in this class of cases, so important is it to maintain the utmost confidence in the efficiency of judicial sales, the purchaser should be protected against all pretences of a trust by parol, unless his *mala fides* be proved by the clearest and most complete evidence. But where such demonstrative proof exists, and where the contract between the defendant in execution and the purchaser is not of such a character as to affect injuriously the rights of creditors, a court of equity will frustrate the contemplated fraud by enforcing the contract specifically between the parties."³ A. having

"Can it be tolerated," said the court, "that a creditor shall, at a sale of his debtor's property, lull him to sleep and keep off other purchasers, by an agreement under which he buys in the land for a small sum much below its value, and then that he should declare that the agreement was void under the statute of frauds, and that the other party should have no benefit from the agreement, whilst he reaped all the fruits? Surely not. Courts of justice would be blind, indeed, if they could permit such a state of things."

¹ Laing v. McKee, 13 Mich., 124, Martin, Ch. J., *dissenting*.

² Green v. Ball, 4 Bush, 586. And see Combs v. Little, 3 Green Ch., 310; Marlatt v. Warwick, 18 N. J. Eq., 108; S. C., 19 Ib., 439.

³ Beasley, C. J., in Merritt v. Brown, 21 N. J. Eq., 401.

a mortgage on certain real estate which was about to be sold under a judgment in favor of B., entered into a verbal agreement with B. that he should buy the property, and, upon payment to him of his debt, and certain rents, he should convey the land to A. Held that B. could not retain the property thus acquired, relying on the statute of frauds.¹

§ 254. *Parol reformation of written instrument.*—A court of equity may carry the intention of the parties into execution where the written agreement has failed to express it.² A party may prove by parol, a mistake in a written agreement, and have it rectified and then specifically enforced. But it must be conclusively shown that a mistake was committed, and that the written agreement does not conform to the intention of the parties; and the correction proposed to be made must be established by equally conclusive proof.³ Parol evidence is admissible to show that an absolute deed was intended as a mortgage, and that the defeasance had been omitted, or destroyed, by fraud or mistake; and it is the same if it be omitted by design upon mutual confidence between the parties.⁴ Although parol evidence is not admissible to change an absolute conveyance into a trust; yet, where the contract agreed upon has not been committed to writing through fraud, accident, or mistake, a trust may be proved by parol.⁵ If one of the contracting parties insists on a certain stipulation, and desires it to be made a part of the written agreement, and the other, by his promise to conform to it as if it was inserted in the written agreement, prevents its insertion, this is a fraud, and equity will enforce the agreement as if the stipulation had been inserted.⁶ “Where it appears that the

¹ Rose v. Bates, 12 Mo., 30.

² Hunt v. Rosmanier, 8 Wheat., 174; Tyson v. Passmore, 2 Pa. St., 122.

³ Philpott v. Elliott, 4 Md. Ch., 273. See *post*, §§ 368, 369.

⁴ Taylor v. Luther, 2 Sumner, 228; Artz v. Grove, 21 Md., 456.

⁵ Barnard v. Flinn, 8 Ind., 204.

⁶ Overton v. Tracy, 14 Serg. & R., 326.

understanding, at the time of the verbal promise, was, by a writing to comply with the provisions of the statute of frauds, it is something more than a mere verbal promise. The opposite party relies upon the special stipulation to reduce it to writing, and thus make him secure. A chancellor would decree its specific performance. If, in confidence that such writing will be executed, the legal title is acquired, it is a fraud in the purchaser to refuse to do what was promised, and claim to hold discharged of it, which will constitute him a trustee *ex maleficio*.”¹ Where the bill alleged that the defendants promised to insert in the deed from them to the plaintiff a covenant that the land conveyed contained seven acres, and, if it fell short of that quantity, that they would make good the deficiency, and that a deed was drawn with such a covenant, but that the defendants erased it fraudulently without the plaintiff’s knowledge, and induced him by false representations to accept the deed, supposing that the covenant was contained therein, it was held that the plaintiff was entitled to have the deed reformed by inserting the covenant.² When, however, “the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the statute of frauds; or when the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer to such a proceeding; unless the plea of the statute can be met by some ground of estoppel to deprive the party of the right to set up the defence. The fact that the omission or defect in the writing, by reason of which it failed to convey the land, or express the obligation which it is sought to make it convey or express, was occasioned by mistake, or by deceit and fraud, will not alone

¹ Wolford v. Herrington, 74 Pa. St., 311, per Sharswood, J.

² Metcalf v. Putnam, 9 Allen, 97.

constitute such an estoppel. There must occur, also, some change in the condition or position of the party seeking relief, by reason of being induced to enter upon the execution of the agreement, or to do acts upon the faith of it as if it were executed, with the knowledge and acquiescence of the other party, either express or implied, for which he would be left without redress if the agreement were to be defeated."¹

¹ Wells, J., in *Glass v. Hulbert*, 102 Mass., 24. Where there is a written contract in relation to land, and some of the terms or provisions in the verbal agreement of the parties are not included in the writing, but omitted by design, even on the express understanding that such provisions should be carried into effect in the same manner as if they had constituted part of the written instrument, there is no fraud, undue influence, surprise or mistake, either in the making of such contract, or in reducing it to writing; parol evidence alone will not be admitted to enforce the omitted provisions, or for the purpose of contradicting, adding to, or varying the written instrument, although subsequently to its execution, one of the parties has fraudulently refused to comply with the omitted provisions, and in open violation of good faith and fair dealing, insists upon his right, under the statute of frauds, to have the contract as written, carried into effect. *Eccleston, J.*, in *Wilson v. Watts*, 9 Md., 356. See *Heth v. Wooldridge*, 6 Rand, 605; *Chetwood v. Brittan*, 1 Green Ch., 438; *Luckett v. Williams*, 37 Mo., 388; *Espy v. Anderson*, 14 Pa. St., 308. Where an agreement was entered into for the conveyance of real estate upon the payment of a certain sum of money, and the execution and delivery of a mortgage for the balance, and subsequently a parol agreement was made between the parties for the conveyance of a less quantity than was called for by the written agreement, it was held that specific performance of the original agreement would be decreed upon the tender of the money and the mortgage. *Merkle v. Wehrheim*, 32 Ill., 534. A. gave a bond to convey certain land to B. when demanded by him, and B. bound himself to pay for the same within twelve months from the date of the obligation. On a bill for specific performance, a tender within the stipulated time, and a refusal to convey, were proved. The answer alleged an agreement that B. was to erect certain works on the land, and, that on failure to do this, the land was to revert to A. Held that parol evidence was not admissible to add a new condition to the bond, and that inadequacy of price alone, no fraud being shown, was not a sufficient reason to set aside the bond. *January v. Martin*, 1 Bibb., 586. Where the defendant agreed in writing to convey to the plaintiff, certain real estate, upon the payment by him of notes given for the purchase money, and afterward verbally promised to execute and deliver the conveyance, upon the payment of the notes before they fell due, it was held that a suit for the specific performance of the contract, as modified by the verbal promise, could not be maintained. *Brooks v. Wheelock*, 11 Pick., 438. More latitude will be given the respondent in the introduction of verbal stipulations varying the contract, than will be given to the petitioner. *Quinn v. Roath*, 37 Conn., 16. The evidence offered in this case, and which it was held should have been admitted, was for the purpose of proving that before the writing was completed and signed, the parties verbally agreed that unless the payment by the petitioner of \$25 parcel of the purchase money was made on the 1st of April, the contract was to be void. When the parties agree by the writing itself, that parol evidence may establish terms and conditions not specified in the agreement, such evidence is admissible because the parties have agreed to admit it. *Fowler v. Redican*, 52 Ill., 405.

§ 255. *Where property is obtained by fraud.*—The defendant will not be permitted to avail himself of the statute of frauds to protect his legal title to land in which the plaintiff had an equitable interest, when the defendant acquired his title by purchase at a judicial sale for half the value of the land upon his representations, calculated to stifle competition among bidders, that he was buying for the benefit of the plaintiff.¹ And where competition is fraudulently destroyed or reduced, it matters not whether or not there was an agreement for the benefit of the debtor.² If the defendant entered into the arrangement with the premeditated design to mislead the confidence of the plaintiff, and, by practicing upon his credulity and want of caution, to get the title of property into his own hands, and then convert it into the means of oppressively using it for his own benefit, the case would be out of the statute of frauds.³ Where the plaintiff claimed moneys obtained by the defendant under pretence of paying for land purchased on joint account, but which were not in fact used for that purpose, it was held that the defendant could not avail himself of the defence that the agreement was void under the statute of frauds.⁴

¹ Kinard v. Hiers, 3 Rich. Eq., 423. See Teague v. Fowler, 56 Ind., 569.

² McDonald v. May, 1 Rich. Eq., 95; Schmidt v. Gatewood, 2 Ib., 162. Certain land owned by two persons in common having been put up for sale at auction, the agent of one of them, without the knowledge or consent of the other, bid off a portion of the land and signed a memorandum of purchase. In a suit in equity by the other tenant in common to compel the purchaser to accept a deed from him of an undivided half of the land so bid off, and to pay the plaintiff one-half of the price thereof, it was held that as there was no contract in writing between the plaintiff and defendant for the sale and purchase of the land in question, or any memorandum of such a contract, the bill must be dismissed. Gill v. Bicknell, 2 Cush., 355. "Whether one of two tenants in common may bid at such a sale, in competition with strangers, and without notice to that effect given to bidders, is doubtful; but in the case of a single owner, the bidding through a third person, without notice, would be fraudulent. Where there are several owners, as, for instance, the members of a joint stock land company, if it were distinctly stated in the terms of sale that each member might bid on his own individual account, it being understood to be *bona fide*, and, as between himself and his co-tenants, an actual purchase on his several account, to be taken and paid for by him, as by other bidders, such notice would probably avoid all imputation of deception, and the sale be therefore valid." Ib., per Shaw, C. J.

³ Jenkins v. Eldredge, 2 Story, 181, per Story, J.

⁴ Willink v. Vanderveer, 1 Barb., 599.

§ 256. *Where parol agreement is without consideration.*—A contract has never been taken out of the statute in favor of a party who has no existing interest in the property, who has done no act of part performance, and who has parted with nothing under the contract, simply upon the ground that the other party was guilty of a fraud in refusing to perform his part of the agreement.¹ This principle was illustrated in the following case. The plaintiff and defendant being present at an auction sale of real estate, entered into a verbal arrangement that the defendant should bid off the property in his own name, pay the sums to the auctioneer and vendor required by the conditions of sale, and enter into a written contract for the purchase of the land, in accordance with his bid and the terms of sale, and that the land should be conveyed to both as tenants in common; that the plaintiff should presently refund to the defendant the one-half of the money paid by him; and that both parties, upon the receipt of the conveyance, should join in the bonds and mortgages required to be given. The defendant, having bid off the land, and taken a contract, it was held that the plaintiff could not compel a conveyance pursuant to the agreement.² The same was held, where three persons verbally agreed that if either should be the purchaser of a lot of land at a sale, they should all be equally interested, and, on receipt of the deed by the purchaser, he should convey one-third to each of his associates; and the purchaser having refused to convey, one of the parties tendered one-third of the purchase money, and then brought a

¹ A resulting trust will not in general arise from the subsequent payment by the party setting up the trust. *Graves v. Dugan*, 6 Dana, 331; *Botsford v. Burr*, 2 Johns Ch., 405; *Jackson v. Moore*, 6 Cowen, 706; *Rogers v. Murray*, 3 Paige Ch., 390; *Hollinda v. Shoop*, 4 Md., 465; *Conner v. Lewis*, 16 Me., 268; *Buck v. Pike*, 11 Ib., 9; *Pinnock v. Clough*, 16 Vt., 500; *Alexander v. Tams*, 13 Ill., 221. But this rule, as has been shown, does not apply, where the price paid by the party taking the conveyance is loaned to or advanced for the benefit of the party claiming the property. *Bartlett v. Pickersgill*, 1 Ed., 515; *Lathrop v. Hoyt*, 7 Barb., 59; *Reeve v. Strong*, 14 Ill., 94.

² *Levy v. Brush*, 45 N. Y., 584. And see *Barnet v. Dougherty*, 32 Pa. St., 371; *Hogg v. Wilkins*, 1 Grant Pa., 67; *Patterson v. Horn*, Ib., 301; *Campbell v. Campbell*, 2 Jones Eq., 364; *Wallace v. Brown*, 10 N. J. Eq., 308; *Dodd v. Wakeman*, 26 Ib., 484.

suit to compel a conveyance.¹ So, where a mortgagee agreed, by parol, to bid in the property for the mortgagor, but bought it for himself, and there were no circumstances of fraud, it was held that the agreement could not be enforced.² In another case, the bill having stated that the plaintiffs were induced, by the fraudulent representations of the defendant, to convey to him certain land, for the purpose of raising money to pay off mortgages and attachments thereon, he promising to convey the land to the plaintiffs, it was held that as the alleged trust did not arise by implication of law, the agreement was within the statute of frauds, and void.³ Where a mortgage is given on several parcels of land, the mortgagor cannot avail himself of a verbal agreement entered into at the time of executing the mortgage, that if the mortgagor should sell one of the parcels, the mortgagee would release it from the mortgage upon the payment of a certain sum.⁴ But where a mortgagee entered into a parol agreement to release the mortgagor from his personal liability, if he would convey the land to a third person, it was held that such agreement might be enforced by the mortgagor, after performance on his part.⁵

§ 257. *General rule as to part performance.*—It has long been settled in England, that part performance of a parol agreement may take the case out of the operation of the statute of frauds;⁶ and in this country the same doctrine has been adopted in most of the States;⁷ the statute in

¹ Farnham v. Clements, 51 Me., 426. ² Wheeler v. Reynolds, 66 N. Y., 227.

³ Walker v. Locke, 5 Cush., 90. A. built a house for B., for which B. gave a bond to convey a tract of land to which he had no title, except the verbal promise of his father to convey the land to him. A., having filed a bill to enforce a conveyance, it was held, on appeal, that a decree for specific performance against the father, was erroneous, but that B. should be compelled to procure a conveyance or pay damages. Hickman v. Grines, 1 A. K. Marsh, 86.

⁴ Cooper v. Stevens, 1 Johns Ch., 425.

⁵ Coyle v. Davis, 20 Wis., 564.

⁶ Lister v. Foxcroft, Gilb. Eq. R., 4; O'Herlihy v. Hedges, 1 Sch. & Lef., 123; Bond v. Hopkins, lb., 433; Warden v. Jones, 23 Beav., 487; Kelley v. Webster, 10 Eng. L. & Eq., 517.

⁷ Downey v. Hotchkiss, 2 Day, 225; Wilde v. Fox, 1 Rand, 165; Johnston v. Johnston, 6 lb., 370; Ash v. Doggy, 6 Ind., 259; Hoen v. Simmons, 1 Cal., 119; Arguello v. Edinger, 10 lb., 150; Kidder v. Barr, 35 N. H., 235; Hawkins v. Hunt, 14 Ill., 42; Gilmore v. Johnson, 14 Ga., 683; Johnston v. Hubbell, 10 N. J.

some of them expressly excepting part performance. In Michigan, Minnesota, Nebraska, New York, and Wisconsin, the language of the statute on the subject is as follows: "Nothing in this title contained, shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements in cases of part performance of such agreements."¹ In Alabama, verbal contracts for the sale of lands, or of any interest therein, except leases for a term not longer than one year, are declared to be void, "unless the purchase money or a portion thereof be paid, and the purchaser be put in possession of the land by the seller."² In California, a parol agreement for the sale of land, or of any interest therein, other than an estate for a term not exceeding one year, to be valid, must have been part performed by the party seeking to enforce it, and such part performance have been accepted by the other.³ In Iowa, the statute does not apply "where the purchase money or any part thereof has been received by the vendor, or where the vendee, with the actual or implied con-

Eq., 332; *Eyre v. Eyre*, 19 Ib., 102. In South Carolina, where a parol contract was clearly proved and part performance, the court decreed a specific performance against the infant heirs of one of the parties, allowing them six months after becoming of age, to show cause against the decree. *Wilkinson v. Wilkinson*, 1 Dessaus Eq., 201. In North Carolina, a court of equity decreed specific performance of a parol contract for the sale of land where there had been no part performance, but held that the contract must be proved as satisfactorily as it could have been done by a writing. *Dark v. Bagley*, 3 Murphy, 33. See *Puttman v. Haltey*, 24 Iowa, 425. A court of equity will decree specific performance of a parol agreement for the purchase of an equitable interest in land for which the vendor has a certificate of purchase from one of the United States land offices, where there has been a part performance. *Kay v. Watson*, 17 Ohio, 27. Although a right of way is an interest in real estate, yet as the taking of land for a highway, is an act done by officers pursuant to authority given them by statute, the claim of the owner of the land taken, for damages, may be released by him by parol before the commissioners, and by an entry thereof on their records. *Fuller v. County Commrs.*, 15 Pick., 81. In Pennsylvania, the statute does not avoid the agreement, but simply restrains its effect. Therefore, in that State, an action may be maintained for the breach of a parol contract to sell or buy land. When, however, such an action is brought against a vendee, the measure of damages is not the price he agreed to pay. *Tripp v. Bishop*, 56 Pa. St., 424.

¹ Comp. Laws of Mich., 1871, Vol. 2, p. 1455, Ch. 166, Sec. 8; Sts. of Minn., 1873, Vol. 1, p. 692, Sec. 13; Sts. of Neb., 1873, Ch. 25, Sec. 6; Rev. Sts. of N. Y., 6th Ed., Vol. 3, p. 341, Sec. 10; Sts. of Wis., 1871, Vol. 2, Ch. 106, Sec. 10.

² Code, 1867, p. 411, Sec. 1862.

³ Code, Sec. 1741.

sent of the vendor has taken and held possession under and by virtue of the contract.”¹

§ 258. *Proof of part performance not allowed.*—In a few of the States, the courts have refused to enforce parol contracts within the statute of frauds, on the ground that they had been partly performed.² In Tennessee, it was early held, under the statute of that State, which is a copy of the English statute, that parol evidence of part performance from which a contract for the sale of real estate might be inferred was inadmissible.³ The court said: “Aside from authority, the statute is simple and unambiguous in its provisions, is consistent with our constitution, and bars all suits upon parol contracts for the sale of lands. Rules of construction, deduced from legal learning, can add nothing to explain the meaning of the Legislature. The English judges of modern times sufficiently lament the decisions of their predecessors going to relieve against cases of supposed or real hardship affected by the statute of frauds.”⁴ In Maine, under the revision of the statutes, “it appears to have been the intention not to authorize, under any circumstances, a decree for the specific performance of a contract not made in writing.”⁵ If merged in a judgment, it would no longer be a contract in writing within the purview of the statute.⁶ In North Carolina, where, to a bill for the specific performance of a parol contract, the defendant denies the contract as alleged and relies on the statute, no parol evidence can be received on the ground of part performance; and the court cannot decree a specific performance, even though the defendant in his answer admit

¹ Code, 1873, Sec. 3663. For a summary of the doctrine of part performance of contracts concerning real estate, see *Wright v. Pucket*, 2 Gratt., 370.

² *Allen v. Chambers*, 4 Ired. Eq., 125; *Lockett v. Williamson*, 37 Mo., 388; *Brooks v. Wheelock*, 11 Pick., 439; *Jacobs v. Peterborough & Shirley R.R. Co.*, 8 Cush., 223; *Hunt v. Roberts*, 40 Me., 187.

³ *Patton v. M'Clure*, Mart. & Yerg., 333.

⁴ *Catron*, J., and see *Ridley v. McNairy*, 2 Humph., 174.

⁵ *Wilton v. Harwood*, 23 Me., 131, per *Shepley*, J.

⁶ *Bubier v. Bubier*, 24 Me., 42.

the parol contract.¹ But the court, under the prayer for general relief, will decree an account for improvements made on the land under such a contract, and a return of the purchase money advanced, deducting therefrom the annual value during the vendee's possession.² In Mississippi it has been held, that as the statute provides that no action shall be brought to charge any person upon any contract for the sale of lands, unless there is a note or memorandum of the same in writing, signed by the party to be charged therewith, the court will create no exceptions.³ Accordingly, where the bill alleged acts of part performance to take the case out of the statute of frauds, it was held that such acts must be laid out of view, it being the settled doctrine of the court that no exceptions of that character would be admitted.⁴ In Massachusetts, where, when the suit was brought, the court had no power under the statute to enforce the specific performance of any contracts, except such as were in writing, it was held that the refusal of the defendant to complete the performance of a parol contract, which had been partly performed, could not be treated as a constructive fraud, and performance be enforced on that ground.⁵

¹ *Ellis v. Ellis*, 1 Dev. Eq., 345; *Barnes v. Teague*, 1 Jones Eq., 277.

² *Baker v. Carson*, 1 Dev. & Batt. Eq., 281; *Albea v. Griffin*, 2 Ib., 9; *Lane v. Neilson*, 1 Jones Eq., 339.

³ *Beaman v. Buck*, 9 Sm. & Marsh, 207; *Hairston v. Jaudon*, 42 Miss., 380.

⁴ *Box v. Stanford*, 13 Sm. & Marsh, 93.

⁵ *Buck v. Dowley*, 16 Gray, 555. See *Abell v. Calderwood*, 4 Cal., 90; *Patterson v. Yeaton*, 47 Me., 308; *Skipwith v. Dodd*, 24 Miss., 487. The departure from a clear design of the statute, by permitting part performance of parol agreements to render them capable of specific enforcement, has been regretted by eminent judges. In *Lindsay v. Lynch*, 2 Sch. & Lef., 5 and 7, Lord Redesdale said: "I am not disposed to carry the cases, which have been determined on the statute of frauds, any further than I am compelled by former decisions. That statute was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest, to any person who has been in the habit of practicing in courts of equity, than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred; whereas, it is manifest that the decisions on the subject have opened a new door to fraud, and that under pretence of part execution, if possession is had in any way whatever, means are frequently found to put a court of equity in such a situation, that, without departing from its rules,

§ 259. *Doctrine of part performance not recognized at law.*—In general, when a contract within the statute of frauds has been in part executed by one party, there is a plain remedy for such party to a certain extent in a court of law, in case the other party fraudulently refuses to execute the contract on his part. If money has been paid, it may be recovered; if labor has been performed, compensation for it may be obtained.¹ But at law, to take a case out of the operation of the statute, there must have been full performance by one of the parties to the contract, the doctrine of part performance being confined to courts of equity.² It was stated by Mr. Justice Buller that, “as it

it feels itself obliged to break through the statute. And I remember it was mentioned in one case in argument, as a common expression at the bar, that it had become a practice to *improve gentlemen out of their estates*. It is therefore absolutely necessary for courts of equity to make a stand, and not carry the decisions further.” In *Forster v. Hale*, 3 Ves., 712, 713, Lord Alvanley said: “I admit my opinion is, that the court has gone rather too far in permitting part performance and other circumstances to take the case out of the statute; and then, unavoidably perhaps, after establishing the agreement, to admit parol evidence of the contents of that agreement. As to part performance, it might be evidence of some agreement; but of what, must be left to parol evidence. I always thought the court went a great way. They ought not to have held it evidence of an unknown agreement, but to have had the money laid out repaid. It ought to have been a compensation. Those cases are very unsatisfactory. It was very right to say the statute should not be an engine of fraud; therefore compensation would have been very proper. They have, however, gone farther: saying it was clear there was some agreement, and letting them prove it. But how does the circumstance of a man having laid out a great deal of money prove that he is to have a lease for ninety-nine years? The common sense of the thing would have been to have let them bring an action for the money. I should pause upon such a case.” In a case in Pennsylvania, the court said: “If judges who allowed themselves originally to be seduced from it by the hardship of particular cases had never swerved, the statute itself, and the necessity of adhering to its provisions, would have become so well known, that many of those distressing cases arising from parol contracts never would have occurred; and at all times, as well now as soon after enacting the law, there would have been less hardship and injustice if its provisions had been strictly followed.” *Coulter, J., in Fry v. Shipler*, 7 Pa. St., 91.

¹ *Kidder v. Hunt*, 1 Pick., 328; *Sherburne v. Fuller*, 5 Mass., 133; *Boyd v. Stone*, 11 Ib., 342; *Mavor v. Pyne*, 2 Car. & P., 91; *Burlingame v. Burlingame*, 7 Cowen, 92; *Gillet v. Maynard*, 5 Johns, 85. Specific performance of a parol agreement will not be decreed on the ground of part performance when the remedy at law is adequate. *Webster v. Gray*, 37 Mich., 37.

² *Lane v. Shackford*, 5 N. H., 130; *Patterson v. Cunningham*, 12 Me., 506; *Norton v. Preston*, 15 Ib., 14; *Allen v. Booker*, 2 Stew., 21; *Johnson v. Hanson*, 6 Ala., 351; *Payson v. West*, Walker, Miss., 515; *Thompson v. Gould*, 20 Pick., 134; *Adams v. Townsend*, 1 Metc., 483; *Seymour v. Davis*, 2 Sandf., 239; *Duncan v. Blair*, 5 Denio, 196; *Thomas v. Dickinson*, 14 Barb., 90; *Eaton v. Whitaker*, 18 Conn., 222; *Sailors v. Gambriel*, Smith, Ind., 82. See remarks of Kent, J., in *Squire v. Whipple*, 1 Vt., 73.

is settled in equity, that part performance takes a case out of the statute, the same rule holds at law.”¹ Lord Eldon, however, showed that the rule could not be same at law and in equity.² And Kent, C. J., in a case before him, said: “There is such a dictum of Justice Buller while sitting in the court of chancery, but it has never been received as law.”³ Moreover, it is reported that Justice Buller afterward, in the case of a demurrer to evidence, declared that “the ground on which a court of equity goes, in cases of part performance, is that sort of fraud which is cognizable in equity only.”⁴ In an early case in Massachusetts, it was said that the doctrine of courts of equity as to the effect of part performance of a parol agreement for the conveyance of land seemed to have been recognized by courts of law. But the decision was rendered on a different point.⁵

§ 260. *Why proof of partial fulfilment allowed.*—The doctrine of part performance is based upon the principle that it would be inequitable, and a fraud on the part of the individual insisting upon the statute, to rely upon it, after having, by his acts, induced his adversary to do acts in part performance of a parol agreement, and upon the faith of its full performance by both parties, and for which he could not well be compensated in any manner except by a specific performance of the agreement.⁶ And hence, the acts of

¹ Brodie v. St. Paul, 1 Ves., 326.

² Cooth v. Jackson, 6 Ves., 12. And see Rondeau v. Wyatt, 2 H. Blk., 63.

³ Jackson v. Pierce, 2 Johns., 221.

⁴ O’Herlihy v. Hedges, 1 Sch. & Lef., 123. But see Walter v. Walter, 1 Whart., 292.

⁵ Davenport v. Mason, 15 Mass., 94.

⁶ Buckmaster v. Harrop, 7 Ves., 346; Mundy v. Joliffe, 5 My. & Cr., 177; Meach v. Stone, 1 D. Chip. Vt., 182; Heth v. Wooldridge, 6 Rand 605; Hamilton v. Jones, 3 Gill & Johns, 127; Merethen v. Andrews, 44 Barb., 200; Neatherly v. Ripley, 21 Texas, 434; Mason v. Blair, 33 Ill., 194; Nye v. Taggart, 40 Vt., 295; Glass v. Hulbert, 102 Mass., 35; Brewer v. Brewer, 19 Ala., 481; Farrah v. Patton, 20 Mo., 81; Dickerson v. Chrisman, 28 Ib., 134; Hane v. Goodrich, 33 N. H., 32; Weber v. Marshall, 19 Cal., 447; Moore v. Small, 19 Pa. St., 461; Ponce v. McWhorter, 50 Texas, 562; Williams v. Morris, 5 Otto, 457; Evans v. Lee, 12 Nevada, 393; 1 Sug. V. & P., 8th Am. Ed., 151. Upon this principle, where a party whose lands are about to be sold by judicial sale, agrees

part performance which will estop one from insisting upon the statute, must be done by the person who relies on the contract; for if the latter chooses to waive the benefit of his acts of part performance, his adversary has no claim to relief founded upon them.' The principle upon which specific performance is decreed of a parol agreement followed by acts of part performance, extends to such contracts as, being entered into by corporations, except for such part performance, would be void for want of the corporate seal.²

§ 261. *What proof of partial fulfilment required.*—As to what shall constitute part performance sufficient to take the agreement out of the statute, there has been some difference of opinion. The general principle is, that the act of part performance must have reference to the contract, be in execution of it, and be an act which would be prejudicial to the party seeking performance, if the agreement were not enforced.³ The act performed should tend to

with another to loan him money, and bid off and hold the land as a security for the money, and the agreement is consummated, the vendor holds the title so acquired as a mortgagee in equity. *Ryan v. Dox*, 34 N. Y., 307. The doctrine of part performance is concisely and comprehensively stated in *Maddock's Chancery Practice*, Vol. I., p. 301, thus: "If, therefore, it be clearly shown what the agreement was, and that it has been partly performed, that is, that an act has been done, not a mere voluntary act, or merely introductory or ancillary to the agreement, but a part execution of the substance of the agreement, and which would not have been done unless on account of the agreement—an act, in short, unequivocally referring to, and resulting from, the agreement, and such that the party would suffer an injury amounting to fraud by the refusal to execute that agreement, in such case, the agreement will be decreed to be specifically performed."

¹ *Rathbun v. Rathbun*, 6 Barb., 98. Where a person in possession of real estate under a parol agreement of purchase, afterward bought a defective outstanding title, and, in an action of ejectment against him by his vendor, did not defend under his agreement, but set up the defective title, and, on a recovery against him, took a lease of the property, it was held that he had waived his rights under the agreement. *Zimmerman v. Wengert*, 31 Pa. St., 401.

² *London & Birmingham R.R. Co. v. Winter, Cr. & Ph.*, 57; *Earl of Lindsey v. Great Northern R.R. Co.*, 10 Hare, 664, 700.

³ *Anderson v. Chick*, 1 Bailey Eq., 118; *Smith v. Smith*, 1 Rich. Eq., 130; *Hatcher v. Hatcher*, 1 McMullan Eq., 311; *Wolfe v. Frost*, 4 Sandf. Ch., 72; *Eckert v. Eckert*, 3 Primrose & Watts, 332; *Dale v. Hamilton*, 5 Hare, 381; *Buckmaster v. Harrop*, 13 Ves., 456; *Lacon v. Mertins*, 3 Atk., 1; *Powell v. Lovegrove*, 8 De G. M. & G., 357; *Eaton v. Whitaker*, 18 Conn., 222; *Kidder v. Barr*, 35 N. H., 235; *Moale v. Buchanan*, 11 Gill & Johns, 314; *Morphett v. Jones*, 1 Swanst., 172; *Peckham v. Barker*, 8 R. I., 17; *Richmond v. Foote*, 3 Lansing, 244; *Hedrick v. Hern*, 4 W. Va., 620; *Welsh v. Bayard*, 21 N. J. Eq.,

show, not only that there has been an agreement, but also to throw light on the nature of that agreement, so that neither the fact of an agreement, nor even the nature of that agreement, rests solely upon parol evidence, the parol evidence being auxiliary to the proof afforded by the circumstances of the case itself.¹ The part performance must be something done with the actual or constructive assent of the defendant. The mere remaining silent, while seeing the purchaser take possession of the land agreed to be sold, and make improvements on it for the purpose for which it was purchased, without remonstrance, might be deemed an assent; but not, the taking of forcible possession of the land by the purchaser,² nor taking possession without the knowledge or permission of the vendor.³ The part

186; *Lester v. Kinne*, 37 Conn., 9; *Billingslea v. Ward*, 33 Md., 48; *Wright v. Pucket*, 22 Gratt., 370; *Davenport v. Mason*, 15 Mass., 84. A party seeking to enforce the specific performance of a parol contract for the exchange of lands, must bring himself within the same conditions as though it was a contract for their sale, before he can invoke the aid of a court of equity. *Purcell v. Miner*, 4 Wall, 513; *post*, § 279. When both parties jointly interested in land enter into a parol agreement for its division, equity will decree specific performance where there has been part performance; but both parties to the agreement must be before the court. *Petray v. Howell*, 20 Ark., 615; *post*, § 277. So, if there be a doubt as to which of two parties claiming the same land under conflicting titles, has the legal title, and they enter into a verbal agreement to compromise and divide the land, specific performance will be decreed where the party seeking it has acted fairly and has partly performed. *Weed v. Terry, Walker*, Mich., 501; *S. C.*, 2 Douglas, 322.

¹ *Stoddert v. Tuck*, 4 Md. Ch., 475; *Semmes v. Worthington*, 38 Md., 298. In 1859 A., having bequeathed certain leaseholds to his sister B., was served, in 1869, with a notice by a railroad company to treat for the leaseholds for the purposes of their road. Surveyors verbally appointed by A. and the company, settled the value of the leaseholds, and A., in the same manner, agreed to the sum named. A. died in February, 1869, and nothing further was done in the matter until April, 1870, when the sale was completed by A.'s executor. It was held that the notice to treat, followed by the valuation by the surveyors, notwithstanding the statute of frauds, was a valid contract. *Watts v. Watts*, L. R. 17, Eq. 217.

² *Camden & Amboy R.R. Co. v. Stewart*, 18 N. J. Eq., 489.

³ *Givens v. Calder*, 2 Dessaus Eq., 171. When part performance, either from the nature of the acts themselves, or from the character of the person permitting them, does not amount to fraud in the party refusing to perform, the jurisdiction in question does not exist. Where, for instance, a person seeks the aid of the court to enforce against a remainder-man, a parol agreement entered into between the plaintiff and tenant for life, acts of part performance which would have been binding on the tenant for life, will not bind the remainder-man, unless it can be shown that he permitted the acts of the plaintiff with a knowledge of the agreement. *Blore v. Sutton*, 3 Mer., 237; *Whitbread v. Brockhurst*, 1 Bro. C. C., 404; *Shannon v. Bradstreet*, 1 Sch. & Lef., 72; *Morgan v. Milman*, 3 De G. M.

performance must be such as to make the agreement reciprocal, and the right to enforce it mutual.¹

§ 262. *What not deemed a partial fulfilment.*—The following acts do not constitute part performance: The drawing of the deeds by the vendor, taking them home, and writing to the vendee that they are ready, and requesting him to call and settle the business; the vendee depositing part of the purchase money with his agent to pay the vendor as soon as the deed is executed, and the agent so informing the vendor; taking possession of the land without the sanction of the vendor.² A. entered into a verbal agreement with B. for the purchase of real estate, and made a small payment, promising to pay the balance in two weeks when the deed, which was deposited with C., as an escrow, was delivered. At the expiration of the time named, A. refused to complete, but purchased of D., who held adversely to B., and took possession. Held, that there was no such part performance as took the case out of the statute.³ The execution and deposit of the deed, “showed a willingness to perform the contract on the part of the plaintiff, though he was not bound to do so, and if that performance had been accepted and taken advantage of by the defendant, the statute would not have shielded him. But the deposit of

& G., 33. “For to constitute fraud, there must coincide, in one and the same person, knowledge of some fact, and conduct inequitable having regard to such knowledge.” Fry on Specif. Perform., p. 177. Of course the acts of persons who are not parties to the contract will not be sufficient. Thus, acts done by arbitrators in the discharge of their duty do not constitute part performance of a parol agreement for a compromise and division of estates by arbitrators. *Cooth v. Jackson*, 6 Ves., 12.

¹ *Smith v. McVeigh*, 11 N. J. Eq., 239. A. sold land to B., and B. to C., A. promising, by parol and without consideration, to convey to C., on receiving the balance due from C. to B. On a bill by C. against A., B. being insolvent, it was held that C. was not entitled to a decree until all the purchase money due from B. to A. was paid. *Tubman v. Anderson*, 4 Har. & M., 357. Equity “does not in all cases require a complainant seeking to coerce performance, to show a performance on his part, or even an ability to perform literally; but he must show that he has not been in default, and that he has taken all proper steps toward performance; and if the compliance does not go to the essence of the contract, relief will be granted.” *McCorkle v. Brown*, 9 Sm. & Marsh., 167; *post*, § 430.

² *Givens v. Calder*, *supra*; *Reeves v. Pye*, 1 Cranch, 219; *post*, § 272.

³ *Townsend v. Hawkins*, 45 Mo., 286.

the deed as an escrow, until he had performed the conditions stipulated, was not a delivery."¹ Where a surveyor and another, enter into a parol contract by which the surveyor is to search for, and survey, swamp lands, the other to pay the first instalment of twenty per cent. purchase money, procure a certificate of purchase, and then deed one-half to the surveyor, such services performed by the surveyor do not constitute a part performance which will take the case out of the statute. The refusal of the other to convey, merely leaves him the creditor of the surveyor.² Where, in the case of a parol gift of land, it appeared that the benefit to the donee by the possession of the land exceeded his expenditure upon it, it was held that the case was not taken out of the statute.³ But where it appeared that the plaintiff entered into a parol agreement with the defendants, that they should purchase certain land adjoining the plaintiff's premises, and convey one-half thereof to the plaintiff; that the plaintiff, in pursuance, and upon the faith, of the agreement, contributed his professional services, worth seventy-five dollars, toward the acquisition of the title, which the defendants got; and that they were insolvent, and claiming to hold this land, which by the statute was exempt from sale under execution; it was held that the plaintiff was entitled to specific performance of the agreement.⁴ So, where it was verbally agreed between a husband and wife, that if she would unite with him in a deed of a portion of her real estate, he would buy certain land, erect buildings on it, and convey it to her, and the agreement was partly carried out by her joining in the deed, and his making the purchase and putting up the buildings, and it appeared that the husband had no

¹ *Ib.*, per Bliss, J.

² *Edwards v. Estell*, 48 Cal., 194. Where A. entered into a contract with B., that in consideration the latter would discharge A. from his agreement to sell shares in a corporation to B., for a sum named, A. would pay B. one-half of whatever he, A., realized over and above said sum, by the sale of such shares to a third person, and the shares were sold by A. at a large advance, it was held that there was no such part performance as took the case out of the statute of frauds. *North v. Forest*, 15 Conn., 400.

³ *Wack v. Sorber*, 2 Whart., 387.

⁴ *Christian v. Smith*, 30 Ga., 96.

other property apart from his wife, it was held that she was entitled to specific performance of the agreement against his heirs.¹

§ 263. *What is done must be solely in pursuance of the contract.*—Acts to be deemed a part performance of a parol agreement so as to estop a party from insisting upon the statute of frauds, should be so clear, certain, and definite, in their object and design, as to refer exclusively to a complete and perfect agreement of which they are a part execution;² and they must be such as could have been done with no other view or design, than to perform the agreement.³ Accordingly, where a tenant in possession filed a bill for the specific performance of an agreement for a lease, and alleged his possession as an act of part performance of the agreement, it was held not to be such, because it might be referred to his character as a tenant.⁴ So, where a tenant from year to year remains in possession, and makes such expenditures on the farm as are customary in the ordinary course of husbandry, it does not constitute part performance of an agreement for a lease.⁵ And the same is true

¹ *Gosden v. Tucker*, 6 Munf., 1. Where a husband and wife agreed by parol that he should buy land in the wife's name and build a house on it, and that another house and lot owned by the wife, should be sold, and the husband, from the proceeds thereof, be repaid for his outlay, and the husband having fulfilled on his part, the wife suddenly died, it was held that he was entitled to have the agreement carried into effect. *Livingston v. Livingston*, 2 Johns Ch., 537.

² *Thynne v. Lord Glengail*, 6 House of Lds., 158; *Rathbun v. Rathbun*, 6 Barb., 98; *Brewer v. Wilson*, 17 N. J. Eq., 180; *Whitridge v. Parkhurst*, 20 Md., 62; *Mundorff v. Howard*, 4 Md., 459; *Aday v. Echols*, 18 Ala., 353; *Smith v. Crandall*, 20 Md., 482; *Bunton v. Smith*, 40 N. H., 352; *Wallace v. Brown*, 10 N. J. Eq., 308; *Cole v. Potts*, Ib., 67; *Charpiot v. Sigerson*, 25 Mo., 63; *Williamson v. Williamson*, 4 Iowa, 279; *Eyre v. Eyre*, 19 N. J. Eq., 102; *Goodhue v. Barnwell*, Rice Eq., 198; *Petrick v. Petrick*, 19 N. J. Eq., 339; *Owings v. Baldwin*, 8 Gill, 337. To take a parol contract for the sale of land out of the operation of the statute of frauds, the evidence should show the quantity of the land, define its boundaries, fix the amount of the consideration, prove that possession was taken in pursuance of the agreement at or immediately after the time it was made, that the change of possession was notorious, exclusive, and continuous, and such a performance by the vendee as cannot be compensated in damages. *Hart v. Carroll*, 85 Pa. St., 508. See *post*, § 276.

³ *Gunter v. Halsey*, Ambl., 586; *Carlisle v. Fleming*, 1 Harring., Del., 421; *Wheeler v. Reynolds*, 66 N. Y., 227.

⁴ *Wills v. Stradling*, 3 Ves., 378; *Hooper, ex parte*, 19 Ib., 479; *Morphett v. Jones*, 1 Swanst., 181; *post*, § 274.

⁵ *Brennan v. Bolton*, 2 Dr. & W., 349.

where a tenant sets up the rebuilding of a party wall, which was in a ruinous condition, as part performance of an agreement by his landlord for a renewal of the lease ; as the act might have been done by the tenant in respect to his title under the old, as well as under the alleged new term.¹ But in order to open the door for the introduction of evidence of the parol contract relied on, it is sufficient to show that acts of part performance were done in pursuance of some agreement, and that they are consistent with the agreement alleged.² The principle of acts of part performance was illustrated in a case under the 17th section of the statute of frauds, which came before the English court of common pleas. It was there held, that bare acceptance of goods by the buyer was sufficient to satisfy the statute, and that although he stated, immediately after accepting them, that he did so on terms different from those on which the seller delivered them, yet, as the acceptance proved a contract of sale, parol evidence of its terms was admissible. It was urged that the acceptance must be equivalent to a memorandum in writing, and must show all the terms of the contract. But the court decided that this was unnecessary. Williams, J., said : "The Legislature has thought, that where there is a fact so consistent with the existence of a contract of sale as the actual acceptance of part of the goods sold, the necessity of written evidence of the contract might safely be dispensed with. But it is clear that it was not meant to go to all the terms of the contract, and that acceptance is no evidence of the price, but only establishes the broad fact of the relation of vendor and vendee. So, where there is proof of part performance,

¹ *Frame v. Dawson*, 14 Ves., 386.

² *Forster v. Hall*, 3 Ves., 712 ; *Dale v. Hamilton*, 5 Hare, 381. Where the bill alleged a parol agreement for a lease for three lives, and payment of rent in part performance, and the defendant admitted an agreement for one life, but not for three, the court refused to enforce an agreement for a lease for three lives, the part performance being consistent with the agreement admitted by the defendant. *Lindsay v. Lynch*, 2 Sch. & Lef., 1, 8.

the jury must settle all the other facts that go to make up the contract."¹

§ 264. *Partial fulfilment must relate to what might itself be enforced.*—The agreement to which the acts of part performance refer, must be of such a nature that the court would have had power to enforce it if it had been in writing. Although where equity has jurisdiction of the subject matter, the want of a writing will not deprive the court of power to enforce the contract if there have been part performance, yet the want of a writing cannot itself be made the ground of jurisdiction. If it were so, all parol agreements might be enforced in equity when there had been part performance, which is not the case.² Two persons having, on the same day, and in the presence of the same witnesses, executed mutual wills, and one of them having died, it was urged that there was part performance, under the circumstances, solely referable to an agreement between the testators to make such wills. But it was held a mere honorary engagement, which the court could not carry out.³

§ 265. *Evidence of agreement.*—The parol agreement must be clearly proved, in order to take it out of the statute by part performance.⁴ The contract must also be certain, clear, and definite, the contract and remedy be mutual, and the complainant not have been guilty of laches.⁵

¹ Tomkinson v. Staight, 17 C. B., 697.

² Kirk v. Bromley, 2 Phil., 640.

³ Lord Walpole v. Lord Orford, 3 Ves., 402. Every loose conversation cannot be turned into a contract, although the parties may seem to agree. The question of assent is important, and should be carefully weighed, with all the circumstances. The following instruction was held proper: "If the jury believe that all the terms of the contract were not finally arranged the first day, but that the entire contract was to be arranged and reduced to writing the next day, there was no binding contract between the parties, unless a contract was proved to have been made on the next day, or on some subsequent day." Brown v. Finney, 53 Pa. St., 373.

⁴ Reynolds v. Waring, Younge, 346.

⁵ Miller v. Cotten, 5 Ga., 341; Printup v. Mitchell, 17 Ib., 558; Colson v. Thomson, 3 Wheat., 336; Minturn v. Baylis, 33 Cal., 129; Charnley v. Hansbury, 13 Pa. St., 16; Brewer v. Wilson, 17 N. J. Eq., 180; Cooper v. Carlisle, Ib., 525; Petrick v. Ashcroft, 19 N. J. Eq., 339; Force v. Dutcher, 18 Ib., 401; Long v. Duncan, 10 Kansas, 294; Phillips v. Thompson, 1 Johns Ch., 149;

Equity will not enforce specific performance of a parol agreement, if the evidence of such agreement be contradictory.¹ Where but one witness testified to part performance of a verbal contract to convey land, and his testimony on this point was in direct conflict with the answer, the court refused a decree for specific performance.² The agreement set up, must appear to be the same with the one partly performed.³ But, "if the contract proved, correspond with that described in the pleadings, it will be established and enforced even if there is some variance between the terms described and those proved, provided this variance does not relate to matters of substance. If there be evidence of a contract, but it do not distinctly appear what are the terms thereof, and there seems also to have been an act applicable only on the supposition of an agreement, a court of chancery will exert itself to ascertain the precise terms, and, if necessary for that purpose, will direct a trial at law, and then, if the agreement can be defined, and the acts of part performance be consistent therewith, it will decree a specific execution thereof."⁴

§ 266. *Partial fulfilment with reference to a part of the transaction.*—Although, where an entire contract is partially within the statute of frauds, the whole is avoided by it, yet, by part performance of the contract, the whole is made

Parkhurst v. Van Cortlandt, *Ib.*, 284; Blanchard v. McDougal, 6 Wis., 167; Knoll v. Harvey, 19 *Ib.*, 99; Allen v. Webb, 64 Ill., 342; Wright v. Wright, 31 Mich., 380; Hall v. Hall, 1 Gill, 383; Pierce v. Catron, 23 Gratt., 588; Shropshire v. Brown, 45 Ga., 175; Gosse v. Jones, 73 Ill., 508; Stoddert v. Tuck, 5 Md., 37; Smith v. Crandall, 20 *Ib.*, 500; Worthington v. Semmes, 38 *Ib.*, 298; Reese v. Reese, 41 *Ib.*, 554.

¹ Rowton v. Rowton, 1 Hen. & Munf., 92.

² Broughton v. Coffey, 18 Gratt., 184. The evidence of a sale or gift of real estate in consideration of services rendered, must be direct, positive, clear, and satisfactory. Bush v. Bush, 9 Pa. St., 260; Sanders v. Wagonseller, 19 *Ib.*, 248; Lantz v. Fry, *Ib.*, 366; Candor's Appeal, 5 Watts & Serg., 515; McCue v. Johnston, 25 Pa. St., 306.

³ Byrne v. Romaine, 2 Edw. Ch., 445; Chesapeake & Ohio Canal Co. v. Young, 3 Md., 480; Phillips v. Thompson, *supra*; Osborn v. Phelps, 19 Conn., 63; Shepherd v. Shepherd, 1 Md. Ch., 244; Beard v. Linthicum, *Ib.*, 345; Haight v. Childs, 34 Barb., 186; 4th Kent's Com., 12th Ed., 451.

⁴ Marcy, J., in Harris v. Knickerbacker, 5 Wend., 638.

available.¹ If a part of the contract be fraudulently omitted from the writing, the court may disregard the writing, and treat the whole transaction as a verbal contract; and upon the basis of the part performance, where possession has been taken, or the acts done amount to part performance, it may receive parol proof of the whole agreement, independently of, or in connection with, what may be in writing, in order to make out the contract.² A parol purchase of several lots of land sold together to the same purchaser, but by distinct particulars, may be made available by part performance as to one of them, without being so as to the others.³ Where the owner of two parcels of land, verbally agrees to sell them for a gross sum, gives a deed of one of them, and promises to convey the other soon, and the vendee pays the whole purchase money and takes possession of both parcels, the agreement is not merged in the deed, nor varied by the purchaser's consent to wait for the conveyance of the other parcel. Neither does the transaction constitute a new parol agreement. But the giving of a deed of one parcel, is a part performance by the vendor of the original agreement.⁴

§ 267. *Promise in behalf of stranger.*—A third person may maintain a suit on a parol promise made for his benefit, although he is not a party to the contract. A., having agreed to sell land to B. for greatly less than it was worth, on condition that B. would lease the land to C. for life, directed his agent, with whom the deed was left, by a memorandum in writing, to deliver the deed to B. on payment of the purchase money, which was done. B. refusing to give a lease to C., it was held that the latter could maintain a bill in equity against B. therefor, and that there was such a part performance of the agreement as took it out of the statute of frauds.⁵

§ 268. *Mere payment of money not part performance.*—Eminent judges, by losing sight of the leading principle

¹ Dock v. Hart, 7 Watts & Serg., 172.

² Phyfe v. Wardell, 2 Edw. Ch., 47.

³ Buckmaster v. Harrop, 7 Ves., 344.

⁴ Smith v. Underdunck, 1 Sandf. Ch., 579.

⁵ Crocker v. Higgins, 7 Conn., 342.

which lies at the foundation of the doctrine of part performance, have at times seemed to have a confused idea with reference to what definite acts ought to be deemed such a part performance of a parol agreement for the sale and purchase of real estate, as to take the contract out of the statute. Thus, it was formerly held that the payment of a portion of the purchase money was sufficient to entitle the vendee to specific performance.¹ This, as a general proposition, was subsequently denied; and it was then maintained that although payment of a small instalment would not be an act of part performance, yet that the payment of a substantial part of the price would have that effect.² But it is

¹ *Lacon v. Mertins*, 3 Atk., 4. The opinion expressed by Lord Hardwicke in the foregoing case, that the payment of a portion of the consideration was to be deemed part performance, was extra judicial, facts having been proved in the case which have always been deemed part performance, namely, possession delivered, and improvements made. And the same is true of a similar opinion expressed by Thompson, J., in *Wetmore v. White*, 2 Caines' Cas. in Error, 109.

² *Main v. Melbourn*, 4 Ves., 720, per Lord Rosslyn. See *Wills v. Stradling*, 3 Ves., 378; *Simmons v. Cornelius*, 1 Rep. in Ch., 138; 2 Story's Conf. of Laws, 64; Sug. V. & P., Ch. 8, Sec. 3. In Iowa, the Code, Sec. 3665, provides that the statute shall not apply "where the purchase money, or any part thereof, has been received by the vendor." And see *Fairbrother v. Shaw*, 4 Clarke, Iowa, 570. In *Townsend v. Houston*, 1 Harring. Del., 532, it was held that payment of a substantial portion of the purchase money, may constitute such a part performance of a parol agreement for the sale of land, as will take the agreement out of the statute of frauds. The ground taken by the court, was stated by Johns, chancellor, thus: "There may be cases in which payment of the whole or part of the purchase money, will amount to performance of a parol contract concerning lands; and whenever non-performance on the part of the vendor, after receiving the purchase money, or a part thereof, would put the party into a situation that is a fraud upon him unless the agreement is performed, the court, upon the principle of preventing fraud, should decree specific performance. If the fact of payment is connected with the concurrent act of the vendor receiving and appropriating the money paid as purchase money, and this appears, either by the defendant in his answer confessing the receipt of the money for that purpose, as charged in the bill, or, if denied, it be proved upon him by writing, as by letter under his hand, or other written evidence; or if the defendant confesses the receipt of the money, but says he borrowed it from the plaintiff, and had it not in execution of the agreement, then if the plaintiff prove the receipt of the money by the defendant for the purpose in the bill; in all such cases, and upon every principle, it seems to me such a fact, thus appearing, would be conclusive evidence of an existing agreement of which it was part performance, and which, the defendant having carried part into execution, should be compelled specifically to perform the whole." See *Thompson v. Tod*, 1 Pet. C. C., 388. Where the complainant alleged an agreement of the respondent to execute a new lease in consideration that the complainant would pay an increased rent, and also alleged that "he paid the rent of fifteen hundred dollars, for the last year, as part and parcel of the agreement aforesaid, and in performance and consideration thereof, and not otherwise," it was held that such allegation of part performance was sufficient to take the case out of the statute of frauds. *Spear v. Orendorf*, 26 Md., 37.

obvious that such a criterion is wholly uncertain, and that it only raises a question, without establishing any fixed rule. For where shall the line be drawn between what may be deemed a small, and what a considerable part of the purchase money? Afterward, the court refused to recognize any such distinction;¹ and it is now no longer entertained, because it is impossible to discriminate between substantial and unsubstantial part payment;² and "each must, upon principle, stand upon the same reason, namely, that it is a part performance in both cases, or not in either."³ All of the later authorities therefore agree that the mere payment of money will not entitle a vendee to the specific performance of a parol contract for the purchase of an interest in land.⁴ So, if the alleged payment consist partly of services rendered, and partly of money, some other act must be shown to have been done of such a nature that a refusal to execute the agreement would inflict upon the party performing the act an injury amounting to fraud.⁵ Where the defendant, a railroad company, verbally agreed to convey to the plaintiff its interest in real estate in consideration that the plaintiff would procure and pay a certain amount of county warrants, which were tendered to the defendant's agent, according to agreement, but the defendant refused to con-

¹ Clinan v. Cooke, 1 Sch. & Lef., 22, per Lord Redesdale.

² Watt v. Evans, 4 Y. & C. Ex., 579. See Hooper *ex parte*, 19 Ves., 479.

³ Story's Eq. Juris., Sec. 760.

⁴ O'Herlihy v. Hedges, 1 Sch. & Lef., 129; Alsopp v. Patten, 1 Vern., 472; Leake v. Morris, 2 Ch. Cas., 135; Lord Pengall v. Ross, 2 Eq. Cas. Abr., 46, Pl. 12. See Good v. Meale, Prec. Ch., 560; Coles v. Trecothick, 9 Ves., 234; Frame v. Dawson, 14 Ib., 388; Jackson v. Cutwright, 5 Munf., 303; Mialhi v. Lassabe, 4 Ala., 712; Hart v. McLellan, 41 Ib., 251; Black v. Black, 15 Ga., 445; Sites v. Keller, 6 Ohio, 483; Garner v. Stubblefield, 5 Texas, 552; Dugan v. Colville, 8 Ib., 126; Netherly v. Ripley, 21 Ib., 434; Wood v. Jones, 35 Ib., 64; Hood v. Bowman, Freeman, Miss., Ch. 290; Blanchard v. McDougal, 6 Wis., 167; Smith v. Finch, 8 Ib., 245; Parke v. Leewright, 20 Mo., 80; Underhill v. Allen, 18 Ark., 466; Parker v. Wells, 6 Whart., 153; Workman v. Guthrie, 29 Pa. St., 445; Lanz v. McLaughlin, 14 Minn., 72; Cole v. Potts, 10 N. J. Eq., 67; Blodgett v. Hildreth, 103 Mass., 404; Cogger v. Lansing, 43 N. Y., 559; Odell v. Montross, 68 N. Y., 499. See Gilbert v. Trustees, etc., 12 N. J. Eq., 180; 1 Fonbl. Eq., Book I., Ch. 3, Sec. 38; 1 Mad. Ch., 301; Newland on Contracts, Ch. 10, p. 187.

⁵ Horn v. Ludington, 32 Wis., 73.

vey, it was held that the contract was within the statute of frauds, and could not be enforced.¹

§ 269. *Ground of rule as to payment.*—Several reasons have been advanced why payment of the purchase money, in whole or in part, is not sufficient to take a parol agreement for the sale of land out of the statute. It has been said that the money may be repaid, and the parties thus be restored to the situation they were in previous to the contract, there being no wrongful intent attributable to the vendor if, in consequence of his having become bankrupt, it is out of his power to restore the amount paid.² Again, it has been contended that from the silence of the 4th section of the statute of frauds as to part payment, which is mentioned in the 13th section, it is to be presumed that the Legislature did not intend that part payment should be binding in the case of the sale of land.³ But the main ground relied on, and the one chiefly entitled to consideration, is, “that nothing is to be deemed a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed.”⁴ The part

¹ *Wilson v. Chicago, etc., R.R. Co.*, 41 Iowa, 443. In *Glass v. Hulbert*, 102 Mass., 24, a bill was filed by the purchaser of a lot of land, after receiving the deed and paying the purchase money, but possession not taken, for relief on several grounds, and, among others, because during the negotiation for the sale of the lot the defendant represented that it included land which it did not include, and, under that misrepresentation, the plaintiff agreed to make the purchase. It was held, in reference to the additional land, that no decree could be made for its conveyance in the absence of any evidence to estop the defendant from pleading the statute of frauds, and that the only relief was by an action for damages. In North Carolina even the payment of the whole purchase money, and delivery of possession to the vendee, will not dispense with a writing if the statute be insisted on. *Allen v. Chambers*, 4 Ired. Eq., 125. But if the defendant admit the contract and the part performance, the court will decree compensation to the plaintiff for his payments and expenditures. *Dunn v. Moore*, 3 Ired. Eq., 364; *Winton v. Fort*, 5 Jones Eq., 251; *Barnes v. Brown*, 71 N. C., 507.

² *Clinan v. Cooke*, 1 Sch. & Lef., 22, 41. Where a portion of the purchase money is paid under a parol agreement for the purchase of land, and the vendee files a bill for specific performance, if the vendor sets up the statute of frauds in defence, he will be decreed to repay the amount received, with interest, although by the agreement it was to be forfeited, unless other payments were made, and the vendor is not entitled to be allowed for his losses by reason of the premises remaining vacant during the time he waited for the complainant to fulfil the agreement. *Mialhi v. Lassabe*, 4 Ala., 710.

³ *Watt v. Evans*, 4 Y. & C. Ex., 579. See 13 Ves., 461, *note*.

⁴ *Story's Eq. Juris.*, Sec. 761; *Temple v. Johnson*, 71 Ill., 13.

performance which will accomplish that result must be not merely of that nature which may be said to exist in every case of a refusal to fulfil an agreement after having received the consideration, but which consists in placing the other party in a situation to be held liable as a wrong-doer, or in some other way of being made the victim of a fraud, or of an injury in the nature of a fraud, on account of acts done in part execution of the agreement, unless protected by its complete fulfilment. Part payment by the purchaser will not bind him, because the refusal of the vendee to complete the contract after paying part of his purchase money, would be no fraud upon the part of the seller, but the purchaser's own loss. This was held, where the heir at law of the purchaser sought the enforcement of the contract against the personal representative of his ancestor, and set up his payment of a portion of the purchase money as a part performance.¹ So, it has been doubted whether any acts which admit of alternative remedies can be regarded as part performance, there being no fraud when the remedy other than that by execution of the contract, is pursued.² But the rule that the payment of the consideration will not in general be deemed such a part performance as to relieve a parol contract from the operation of the statute of frauds, does not apply where the consideration is labor and services of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and the vendor did not intend to so estimate them.³ And the same is true where a party has paid money on the contract, and a recovery of the money would not restore him to his former situation.⁴

¹ *Buckmaster v. Harrop*, 7 Ves., 341; 13 Ib., 456.

² *Morgan v. Milman*, 3 De G. M. & G., 35, per Lord Cranworth.

³ *Rhodes v. Rhodes*, 3 Sandf. Ch., 279; *German v. Machin*, 6 Paige Ch., 288.

⁴ *Malins v. Brown*, 4 N. Y., 403. A release, by a wife, of an interest which is within her own option, such as a right of dower, is a valuable consideration. Where a husband agreed to convey a tract of land to his wife if she would release her dower and right in a homestead, it was held that the case was taken out of the statute of frauds by performance when the deed was executed and delivered. *Farwell v. Johnston*, 34 Mich., 342.

§ 270. *Rule as to possession, and reason.*—It may be laid down as a general proposition, that, subject to the rules and exceptions which will hereafter be stated, the delivery and taking possession of land pursuant to a parol contract is part performance, and either party may insist on a specific performance of the agreement.' 'This will especially be the case when the possession is preceded or accompanied by the payment of the purchase money.' Where a purchaser of land at a foreclosure sale verbally agreed with one who was in possession of a portion of the premises under a contract to purchase of the former owner, that upon payment of the price paid at the sale, with interest and costs, the premises should be conveyed to him, after which the agreement was reaffirmed, and possession delivered of the rest of the premises, and the original vendee was authorized to hold and rent the same, which he did, and made payments in accordance with the agreement of more than one-third of the purchase money, it was held that such possession and part payment took the agreement out of the statute of frauds.¹ More has sometimes been claimed from the fact of possession of land under a contract for its sale, than can properly be attached to such an act. Thus it has been said that, without a change of possession, there cannot be a part performance.⁴ It is, however, certain, that part performance as between a vendor and purchaser may consist of acts irrespective of posses-

¹ Pugh v. Good, 3 Watts & Serg., 56; Burns v. Sutherland, 7 Pa. St., 103; Simmons v. Hill, 4 Har. & Mchen., 251; Davis v. Townsend, 10 Barb., 333; Bassler v. Niesly, 2 Serg. & Rawle, 352; Jones v. Peterman, 3 Ib., 543; Letcher v. Crosby, 2 A. K. Marsh, 106; Wilber v. Paine, 1 Ohio St., 251; Peifer v. Landis, 1 Watts, 392; M'Farland v. Hall, 3 Ib., 37; Miller v. Hower, 2 Rawle, 53; Abbott v. Draper, 4 Denio, 51; Burns v. Sutherland, 7 Pa. St., 103; Follmer v. Dale, 9 Ib., 83; Smith v. Underdunck, 1 Sandf. Ch., 579; Gill v. Newell, 13 Minn., 462. *Contra*, Cutlett v. Bacon, 33 Miss., 269.

² Pike v. Morey, 32 Vt., 37; Underhill v. Williams, 7 Blackf., 125; Tibbs v. Barker, 1 Ib., 58; Byrd v. Odem, 9 Ala., 755; Wimberly v. Bryen, 55 Ga., 198; Fitzsimmons v. Allen, 39 Ill., 440; Billington v. Welsh, 5 Binney, 129; Gilday v. Watson, 2 Serg. & Rawle, 407; Drury v. Conner, 6 Har. & Johns, 288; Sutton v. Sutton, 13 Vt., 71; Adams v. Fullam, 43 Ib., 592; Ramsey v. Liston, 25 Ill., 114; Stevens v. Wheeler, Ib., 300; Astor v. Lamoreaux, 4 Sandf., 524; Kellums v. Richardson, 21 Ark., 137.

³ Merethen v. Andrews, 44 Barb., 200. ⁴ M'Kee v. Phillips, 9 Watts, 85.

sion.¹ The doctrine of part performance by possession being well established, it would serve no useful purpose to consider at much length the reasons which have been given for its support. Mr. Story says: "If upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser, if there be no agreement valid in law or equity. Now, for the purpose of defending himself against a charge as a trespasser, and a suit to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his protection; and if admissible for such a purpose, there seems no reason why it should not be admissible throughout."² On the other hand, in an early case in Pennsylvania, the soundness of the foregoing view was questioned by an able judge in the following pertinent remarks: "Seeing that the English act gave to the party put into possession under the parol contract for the purchase of the land in fee an implied, at least if not an express, estate at will, which was sufficient to prevent his being made a trespasser, until the vendor entered upon him and gave him notice to quit, it is difficult to imagine why it should have been deemed necessary to carry the contract into complete execution in order to protect the vendee from being punished as a trespasser for having entered and occupied the land before he had notice to quit."³ A more reasonable ground for the doctrine in question is, that possession by a vendee of land under an alleged agreement for its sale, without

¹ *Hollis v. Edwards*, 1 Vern., 159; *Mundy v. Joliffe*, 5 Myl. & Cr., 167; *Rhodes v. Rhodes*, 3 Sandf. Ch., 279. Where the purchaser of a farm, who had paid the purchase money and taken possession, was induced by the fraudulent representations of the vendor to accept a deed which omitted a portion of the land verbally agreed to be conveyed, it was held that the vendee was not precluded by the statute of frauds from maintaining a suit for the specific performance of the agreement. *Beardsly v. Duntly*, 69 N. Y., 577. The doctrine of equity, that payment by the vendee of part of the purchase money, and taking possession of the land under the contract, is such a part performance as takes the case out of the statute of frauds, is not applied in courts of law. *Barickman v. Kuykendall*, 6 Blackf., 21.

² Story's Eq. Juris., Sec. 761.

³ *Allen's Estate*, 1 Watts & Serg., 383, per Kennedy, J.

objection from the vendor, raises a *prima facie* presumption that the land was entered upon in pursuance of the agreement, and with the intent to carry it out, and that thus an important step toward fulfilment of the contract has been taken with the acquiescence of the vendor. "The acknowledged possession of a stranger of the land of another is not applicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract."¹ So, where the possession has been taken without consent, and the owner subsequently permits the intruder to keep possession, it will operate as an act of part performance.²

§ 271. *Possession of land by donee.*—If there be an alleged parol gift of land, the mere possession of the donee does not constitute part performance; there being no valuable consideration, and possession, in such a case, not being inconsistent with permission simply to occupy the land.³ Where a father promised his son a farm, provided he would support his parents as long as they should live, pay his father's debts, and give certain money to his brothers and sisters, and the son paid the latter, part of what he had agreed to do, and supported his parents for a short time, during which he was in possession of the farm in connection with them, it was held that there was not such a part performance as took the agreement out of the statute.⁴ If, however, the gift is accompanied by circumstances which, together with acts and declarations, show an intention on the part of the donor to bestow the land absolutely on the donee, the latter will be entitled to specific performance. Thus, where the plaintiff executed a lease of certain land to the defendant for one year, at the rent of one dollar, and it was proved that the plaintiff had often, after the date of the lease, shown

¹ Sir T. Plumer in *Morphett v. Jones*, 1 Swanst., 181. And see *Butcher v. Stapely*, 1 Vern., 363; *Pyke v. Williams*, 2 Ib., 455.

² *Gregory v. Mighell*, 18 Ves., 328; *Pain v. Coombs*, 1 De G. & J., 34, 46.

³ *Stewart v. Stewart*, 3 Watts, 253; *Pinckard v. Pinckard*, 23 Ala., 649. See *ante*, § 187; *post*, §§ 284–287.

⁴ *Cronk v. Trumble*, 66 Ill., 428.

by his acts and declarations, that he had given the lot to the defendant as a reward for faithful service, and that the defendant had been in possession of the land ever since—a period of twenty-four years—and had paid the taxes, it was held that there was a valid gift.¹ A father promised his daughter, who was about to get married, to give her a house as a wedding present, and immediately after the marriage he put the daughter and her husband in possession. The house was at the same time subject to a charge in favor of a building society, payable in instalments, which were paid by the father as they fell due during his life, leaving a balance unpaid of one hundred and ten pounds, which became due shortly after the father's death. It was held that possession of the house was a part performance which took the case out of the statute of frauds, and that as the father promised to give the house free from incumbrance, the one hundred and ten pounds were payable out of his personal estate.²

§ 272. *What deemed a sufficient possession.*—The possession of the vendee of real estate, to enable a court of equity to decree specific performance of a parol agreement, must be such, that the refusal of the vendor to complete, will be a fraud upon the vendee.³ Where A. agrees to convey the house in which he lives with B., to the latter, if B. will support and care for A., a performance on the part of B. during the life of A., is sufficient to take the case out of the statute of frauds, and the agreement will be enforced

¹ Mahon v. Baker, 26 Pa. St., 519.

² Ungley v. Ungley, L. R. 4, Ch. D. 78; Affd., 5 Ib., 887.

³ White v. Watkins, 23 Mo., 423; Chambers v. Lecompte, 9 Ib., 566. In an action against a husband to foreclose a mortgage, the wife filed a cross complaint alleging a purchase of the land of her husband before the mortgage was given, of which the mortgagee had notice, and that although the land was not conveyed to her, yet she had remained in possession of it ever since, and she asked for a specific performance of the contract of sale. Held that there had been no part performance by her to prevent her being placed in the same situation as before, and that the sale was void. Cuppy v. Hixon, 29 Ind., 522. Where a party has possession of land under a parol contract for its purchase, and abandons it, equity will not enforce specific execution. Chambliss v. Smith, 30 Ala., 366.

against the heirs of A.¹ A. having a preemption right to land, and not being able to enter it, B. verbally agreed to enter it in his own name, and convey it to A. upon the payment of fifty dollars by him within one year, with interest. A. continued in possession, and after B.'s death, paid the money to his administrator, and it was held that he was entitled to specific performance.² One who enters into possession of land under a verbal agreement for a lease of the same for one year, with the privilege of two years more, at a specified price, and pays the rent for the first year, is entitled to a decree for specific performance against the lessor.³ According to some of the authorities, mere possession, without some other act, such as the payment of the consideration, or the expenditure of money on the land, is never sufficient to take the contract out of the statute.⁴ But this, while safe as a general rule, seems to be an extreme view which should admit of exceptions. The possession must be connected with the agreement, and be referable to it; and it must appear to have been taken with the permission of the vendor.⁵ The reason of this is, that possession, when it is such an act as frees a case from the statute, is evidence to show a part performance by the vendor.⁶ The mere continuance of a previous possession after the sale is not sufficient even though the purchase money may have been paid and improvements made.⁷ There must be some positive act done with reference to the agreement, and intended to

¹ Watson v. Mahan, 20 Ind., 225.

² Fisher v. Moolick, 13 Wis., 321.

³ Clark v. Clark, 49 Cal., 586.

⁴ See Moore v. Small, 19 Pa. St., 461; Dougan v. Blocher, 24 Ib., 28; Ballard v. Ward, 89 Ib., 358.

⁵ Lord v. Underdunk, 1 Sandf. Ch., 46; Bean v. Valle, 2 Mo., 103; *ante*, §§ 261, 262.

⁶ Jarvis v. Smith, 1 Hoff. Ch., 470. See Wills v. Stradling, 3 Ves., 381; Gregory v. Mighell, 18 Ib., 333; Cole v. White, 1 Bro., 409; Morphet v. Jones, 1 Swanst., 179; Foote v. Mitchell, 1 B. & B., 400; Harris v. Knickerbacker, 5 Wend., 638; Givens v. Calder, 2 Dessaus Eq., 171, 190; Thompson v. Scott, 1 McCord Ch., 39; Hood v. Bowman, Freeman (Miss.) Ch., 290; Wood v. Farmare, 10 Watts, 195; Aitkin v. Young, 12 Pa. St., 15; Cristy v. Barnhart, 14 Ib., 260; Carrolls v. Cox, 15 Iowa, 455; Moore v. Highy, 45 Ind., 487.

⁷ Pearson v. East, 36 Ind., 27; Carlisle v. Brennan, 67 Ib., 12; Suman v. Springate, 1b., 115.

be in execution of it.¹ Giving instruction to a scrivener to draw a deed of partition, or other writings deemed necessary for carrying an agreement for partition into effect, and going on to the premises, and measuring off and designating the lines of division according to the agreement, for the purpose of enabling the scrivener to draw the writings, and to describe the several allotments with precision and accuracy, are not such acts as will take the case out of the statute.² Where the alleged sale was made by a person pretending to be the agent of the owner who disavowed the sale, and the property consisted of a vacant lot adjoining the warehouse of the plaintiff and his partner, and was used after the agreement, for storing lumber, wagons, and like articles of the plaintiff and the firm, it was held not such a possession as would take the case out of the statute.³ A parol license or right to mine, becomes a valid and binding agreement by virtue of possession taken and held by the licensee, with the consent of the licensor.⁴ Where under a parol agreement for the sale of a mining claim, the vendee took possession, and worked the mine as his own under the contract, appropriating the proceeds of the mine to his own use, and paid part of the purchase money, it was held that the agreement was taken out of the statute.⁵

§ 273. *Time of possession.*—If a party has been permitted to retain the possession for a very long time, this will be regarded as a circumstance against permitting the statute to be set up.⁶ The certainty of the terms of a parol agree-

¹ *Clinan v. Cooke*, 1 Sch. & Lef., 40; *O'Herlihy v. Hedges*, *Ib.*, 129; *Anderson v. Chick*, 1 Bailey Eq., 124; *Hatcher v. Hatcher*, 1 McMullan Eq., 311; *Poag v. Sandifer*, 5 Rich Eq., 170. In *Kine v. Balfe*, 2 Ball & Beatty, 343, Lord Manners said: "Whether possession be an unequivocal act amounting to part performance, must depend upon the transaction itself. If it be distinctly referred to the contract alleged in the pleadings, I think no case has denied that it is part performance. The defendant is protected from liability as a trespasser, and the plaintiff is disabled from dealing with any other person."

² *Gratz v. Gratz*, 4 Rawle, 411.

³ *Poland v. O'Connor*, 1 Neb., 50.

⁴ *Anderson v. Simpson*, 21 Iowa, 399.

⁵ *Tatum v. Brooker*, 51 Mo., 148.

⁶ *Blachford v. Kirkpatrick*, 6 Beav., 232. Where the vendor of lands, under a parol contract for their purchase and conveyance, caused the lands to be surveyed, received more than half of the purchase price, and put the vendee in possession, which he permitted him to retain for several years without taking

ment for the sale of land, the long lapse of time during which possession was held under it (about twenty-eight years), the value of the improvements, and the payment of the purchase money, were held to render it a peculiarly strong case for specific performance.¹ Where the defendants had the enjoyment of land for more than twenty years under a parol agreement, it was held that they could not shelter themselves behind the statute of frauds.² So, payment of part of the purchase money, and possession of land for eight years, was held to entitle the purchaser to the specific performance of a parol agreement to convey.³ In another case, the land having been assessed to the vendee, with the vendor's consent, for seven years previous to the suit, and the vendor having admitted that he had given the vendee possession, it was held sufficient to take the case out of the statute.⁴

§ 274. *Possession must be taken under agreement.*—Where the possession can be referred to any other source than the parol contract, or to a different contract, the statute applies.⁵ Thus, if a vendor sell to a vendee in possession as tenant, the possession is referred to the original tenancy, and not to the contract of sale.⁶ So with a tenant

steps to put an end to it, it was held that these acts of the vendor constituted such a part performance, as to take the case out of the operation of the statute of frauds. *Bomier v. Caldwell*, 8 Mich., 463.

¹ *Rhea v. Jordan*, 28 Gratt., 678. See *Lester v. Lester*, *Ib.*, 737.

² *Murray v. Jayne*, 8 Barb., 612. ³ *Knickerbocker v. Harris*, 1 Paige Ch., 209.

⁴ *Miranville v. Silverthorn*, 1 Grant, Pa., 410. A. sold land to B. by a parol agreement, and B. went into possession. After one year, the land was surveyed in the presence of B.'s agent, who made no objection to the title or quantity. Two years later, B. wrote to A.'s son, to whom the land had been devised, excusing his delay in making payment, and saying that he would pay when able. A.'s son gave him notice not to use the land any more until payment was made. Held, that the notice not to use the land was an affirmation of the contract, and that as B. had been in possession five years, the agreement was taken out of the statute of frauds. *Palmer v. Richardson*, 3 Strobb. Eq., 16.

⁵ *Danforth v. Laney*, 28 Ala., 274; *Charpiot v. Sigerson*, 25 Mo., 63; *Cole v. Potts*, 10 N. J. Eq., 67; *Knoll v. Harvey*, 19 Wis., 99; *Sitton v. Shipp*, 65 Mo., 297; *Tate v. Jones*, 16 Fla., 216. While negotiations for the sale of real estate were pending, the person wishing to purchase, temporarily resided with the owner as his guest. Held not to be such a part performance as to take the case out of the statute of frauds. *Davis v. Moore*, 6 Rich., 215.

⁶ *Mahana v. Blunt*, 20 Iowa, 142; *Rosenthal v. Freeburger*, 26 Md., 75; *ante*, § 263.

in possession, in case of a parol agreement for different terms of holding, if no acts are performed which clearly show that the possession is continued under the last agreement, it will be referred to the original tenancy, and such parol contract will be void.¹ The attornment of a tenant to satisfy the statute, must be formal, public, and explicit. A., the tenant of B., the owner, was told by him, that if he wanted to live on the premises any longer, he must rent it from C. ; but offering to pay C. the rent at the end of the year, he was told to settle with B. A., when about to quit, gave notice to C. But when he moved out, B. entered, and afterward remained in possession. C. had paid a large part of the purchase money. Held, that there had not been such a palpable and notorious transfer of possession in pursuance of the contract, as took it out of the statute.² But, where under a parol agreement for the sale of land which is under lease, the landlord tells the purchaser that the rent is to belong to him, and this is repeated to the tenant, who agrees to it, the purchaser is seized of the land.³ If, however, a purchaser by parol take possession under his contract, and afterward attorn to the vendor as landlord, or fix upon himself any other character than the one with which he entered, he abandons his equities, and his possession is referred to his new agreement.⁴

§ 275. *Possession taking agreement out of statute.*—The possession of a tenant after the expiration of the lease, when it can be referred only to an agreement for a renewal, has been deemed a part performance of such an agreement.⁵ Where, in a suit for specific performance by a tenant against his landlord, the bill alleged that, toward the close of the term, a parol agreement was entered into be-

¹ *Armstrong v. Kattenhorn*, 11 Ohio, 265 ; *Anthony v. Leftwitch*, 3 Rand, 238 ; *Jones v. Peterman*, 3 Serg. & Rawle, 543 ; *Johnson v. Glancy*, 4 Blackf., 94 ; *Crawford v. Wick*, 18 Ohio St., 190.

² *Brawdy v. Brawdy*, 7 Pa. St., 157.

³ *Williams v. Landman*, 8 Watts & Serg., 55.

⁴ *Rankin v. Simpson*, 19 Pa. St., 471. ⁵ *Dowell v. Dew*, 1 Y. & C. C. C., 345.

tween the plaintiff and defendant, that if plaintiff would pay an increased rent, the defendant would give him a new lease for one year, with the privilege of two or three years, and that plaintiff remained in possession after the expiration of the original lease, and paid the increased rent, "as part and parcel of the agreement aforesaid, and in performance and consideration thereof, and not otherwise, and that plaintiff elected to take a new lease for three years, which the defendant refused to execute, but was about to eject him," it was held that the bill presented a case which *prima facie* entitled the plaintiff to an injunction until the coming in of the answer, and further order.¹ So, a parol agreement having been entered into for a lease, the terms of which were settled, the lessee, by direction of the lessor, instructed the solicitor, who acted for both parties, to prepare a written contract. The solicitor made a memorandum of the terms thus stated to him, and from it wrote out a draft contract containing these and other terms, which he submitted to the lessor, who, without objecting to it, gave the lessee possession, and directed the solicitor to draw a lease in accordance with the draft contract. This having been done, the lessor objected to it, and gave the tenant notice to quit. It was held that there was part performance of the agreement, and it was accordingly enforced.² On the same principle, parol agreements in cases of family arrangements which involve the giving up, partition, or exchange of land, when followed by uninterrupted exclusive possession pursuant to the agreement, will be specifically enforced.³ Where a father, having a written contract for the purchase of land, and having also agreed by parol with his son, that the land should be equally divided between them, it was conveyed by the vendor, and the father and son each remained in possession of his respective part during the life of the father, it was held that such parol agree-

¹ Spear v. Orendorf, 26 Md., 37.

² Pain v. Coombs, 1 De G. & J., 34.

³ Stockley v. Stockley, 1 V. & B., 23; Neale v. Neale, 1 Ke., 672.

ment was taken out of the statute of frauds.¹ The same was held in the following case: A father having bought land with his son's money, it was agreed between them, that the amount should apply on the sale by the father to the son of certain land, and that the son should pay annually a given sum to the father for life. The son was put into possession of the second named land pursuant to the agreement, and he notified his tenant of the first named land, who thereafter paid rent to the father, and the assessments were respectively changed.²

§ 276. *Possession must be absolute.*—The possession must be open, notorious, and actual, and not merely technical; and it must be exclusive, and not in connection with the vendor as a tenant in common or joint tenant.³ Therefore, a tenant in possession cannot be a purchaser by parol without a formal surrender of his possession under the lease, and a resumption of it under the contract of purchase.⁴ A parol contract for the sale of real estate by one partner to another, will not be enforced, when the only change of possession is the withdrawal of the vendor and the continuance of the vendee in possession.⁵ The taking of possession of one of several parcels of land embraced in a parol agreement, and agreed to be sold for a gross sum, would be sufficient.⁶ But the taking possession of one of several lots of land, sold by distinct agreements, would only relieve from the operation of the statute, the agreement in relation to that particular lot.⁷

¹ Rhine v. Robinson, 27 Pa. St., 30.

² Lee v. Lee, 9 Pa. St., 169.

³ Haslett v. Haslett, 6 Watts, 469; Robertson v. Robertson, 9 Ib., 32; Sage v. M'Guire, 4 Watts & Serg., 228; Frye v. Shepler, 7 Pa. St., 91; Blakeslee v. Blakeslee, 32 Ib., 237; Wible v. Wible, 1 Grant Pa., 406; Workman v. Guthrie, 29 Pa. St., 495.

⁴ Greenlee v. Greenlee, 22 Pa. St., 225; *ante*, § 263.

⁵ Wilmer v. Farris, 40 Iowa, 309.

⁶ Smith v. Underdunk, 1 Sandf. Ch., 579; Jones v. Pease, 21 Wis., 644. *Contra*, Allen's estate, 1 Watts & Serg., 383. The rule is the same in the case of a sale of personal property. Elliott v. Thomas, 3 M. & W., 170; Scott v. Eastern Co. R.R., 12 Ib., 33; Price v. Lea, 1 B. & C., 156; Briggs v. Wisking, 25 Eng. L. & Eq., 257; Mills v. Hunt, 17 Wend., 333; S. C., 20 Ib., 431; McKnight v. Dunlop, 5 N. Y., 537; Boutwell v. O'Keefe, 32 Barb., 434.

⁷ Buckmaster v. Harrop, 7 Ves., 341.

§ 277. *Possession by several.*—A parol partition between the several grantees of a tract of land, followed by actual possession, is valid and binding;¹ but not if possession be not taken.² Where the parties to an action of ejectment agree verbally that judgment shall be rendered for the plaintiff, but that his title embraces only part of the property, and that the defendant's title is good for the balance, and that the parties will hold in severalty their respective shares pursuant to the agreement, such agreement, if followed by possession on the part of each according to the title thus conceded, is valid and binding. It is, in effect, a settlement of the claims of parties to such portion of the land as each is entitled to, and a surrender of all claim to any other part than that agreed to belong to each. "There is no substantial difference in principle between such an agreement, when carried out by taking possession in severalty under it, and a parol partition of land between parties in possession and claiming title, accompanied and followed by possession by each party of the part conceded to him."³

§ 278. *Possession under agreement as to division line.*—An express parol agreement to settle a disputed boundary is valid, if executed immediately, and possession accompanies and follows such agreement, and it will preclude the parties from afterward controverting it.⁴ Such an agreement is not a conveyance of land, but only the ascertain-

¹ Corbin v. Jackson, 14 Wend., 619; Ebert v. Wood, 1 Binney, 216; Cummins v. Nutt, Wright, 713; Piatt v. Hubbel, 5 Ohio, 243; Calhoun v. Hays, 8 Watts & Serg., 127; Wilday v. Bonney, 31 Miss., 644; Williams v. Pope, Wright, 406.

² Slice v. Derrick, 2 Rich., 627. In Maryland, in a suit for partition, the parties are not directed to execute mutual conveyances to vest the title in severalty; but the final decree confirms the petition, and declares that each party shall hold his share in severalty, and this decree operates as a conveyance. Young v. Frost, 1 Md., 377. As to establishment of division line by the acceptance of an award, see Sweeny v. Miller, 34 Me., 388.

³ City of Natchez v. Vandervelde, 31 Miss., 706, per Handy, J.

⁴ Boyd v. Graves, 4 Wheat., 513; Jackson v. Dyeling, 2 Caines, 198; Lindsay v. Springer, 4 Harring., Del., 547; Fuller v. County Commrs., 15 Pick., 81; Blair v. Smith, 16 Mo., 273; Jackson v. Corlear, 11 Johns, 123; Kip v. Norton, 12 Wend., 127; Adams v. Rockwell, 16 Ib., 285; Davis v. Townsend, 10 Barb., 333; McCoun, J., *dissenting*; Yarborough v. Abernathy, Meigs, 413.

ment of land already conveyed, by the recognition by the parties of the true line of demarcation between their lands, and of thus confirming their title to the same.¹ If, however, there is no dispute as to the boundary, but the parties have claimed and occupied respectively up to the true line, a parol agreement to change it would constitute an agreement for the conveyance of an estate or interest in land; and it would therefore be within the statute, and void.² It has been held that if, under a parol agreement for the settlement of a disputed boundary, a valuable consideration were paid, it would be evidence of the transfer or surrender of an interest in land, and therefore within the statute.³

§ 279. *Possession upon exchange of property.* — The specific performance of a parol agreement for the exchange of real estate, will be decreed when the agreement has been carried into effect in whole or in part.⁴ There is no difference between a parol sale and a parol exchange of lands, in regard to the requisites to take it out of the statute of frauds; though there is a difference in the evidence which establishes the possession.⁵ Although a parol exchange of lands cannot be supported without a corresponding delivery of possession of each tract, yet the evidence in case of exchange with reference to the time of possession, will admit of greater latitude than in the case of a parol sale.⁶ If the evidence shows an unequivocal and complete taking possession of one of the subjects of an exchange, by the party owning the other subject, it strengthens the evidence of possession taken by the opposite party of the corresponding subject. Proof of possession that might seem weak and

¹ Houston v. Mathews, 1 Yerg., 118.

² Gilchrist v. McGee, 9 Yerg., 455; Davis v. Townsend, *supra*; Bay v. Basin, 12 Sm. & Marsh, 428.

³ Carroway v. Anderson, 1 Humph., 61.

⁴ Johnston v. Johnston, 6 Watts, 370; Caldwell v. Carrington, 9 Pet., 86; Beebe v. Dowd, 22 Barb., 255; Bennett v. Abrams, 41 Ib., 619; Parrill v. McKinley, 9 Gratt., 1.

⁵ Moss v. Culver, 64 Pa. St., 414. See *ante*, § 261, *note*.

⁶ Reynolds v. Hewitt, 27 Pa. St., 176.

inconclusive, in the case of a parol sale, is thus made convincing in the case of an exchange.¹ A parol exchange of land may be valid, although each party does not take immediate possession of his part.²

§ 280. *General rule as to improvements.*—As the mere possession of land, by the vendee, under a parol agreement for its sale, may, as we have seen, under certain circumstances, constitute such a part performance as will take the agreement out of the statute, much more must this be the case, when the vendee, relying on the contract, and with the knowledge and assent of the vendor, has expended money and made valuable improvements on the land; for it is manifest that, while possession is consistent with a tenancy at will, the making of considerable expenditures, can reasonably be referred only to some agreement for a substantial interest in the property. Moreover, in the case of mere possession, the vendee can frequently be fully compensated in damages for non-fulfilment on the part of the vendor; while improvements are often of such a nature that there can be no adequate redress for their loss. Besides, it would be unjust, and contrary to the principles of equity, to permit a vendor, after money had been expended on the property, and its character changed by the vendee on the faith of the agreement, to disavow it, and thus deprive the vendee of the fruits of his enterprise. The rule is therefore well established, that when the vendee has been let into possession under a parol contract, and made valuable improvements, it constitutes part performance, and takes the case out of the statute.³ Where the plaintiffs were in-

¹ Moss v. Culver, *supra*, per Agnew, J.

² Miles v. Miles, 8 Watts & Serg., 135.

³ Wills v. Stradling, 3 Ves., 378; Savage v. Foster, 5 Vin. Abr., 524, Pl. 43, 9 Mod., 37; Sutherland v. Briggs, 1 Hare, 26; Stockley v. Stockley, 1 V. & B., 23; Toole v. Medicott, 1 Ball & B., 393; Mundy v. Joliffe, 5 My. & Cr., 167; Surcome v. Pinniger, 3 De G. M. & G., 571; Newton v. Swazey, 8 N. H., 9. Tilton v. Tilton, 9 Ib., 385; Annan v. Merritt, 13 Conn., 478; Dugan v. Colville, 8 Texas, 126; Grant v. Ramsey, 7 Ohio St., 157; Blackney v. Ferguson, 3 Eng. Ark., 272; Casler v. Thompson, 3 Green Ch., 59; Mason v. Wallace, 3 McLean, 148; Sater v. Hill, 10 Ind., 176; Kidder v. Barr, 35 N. H., 236; Mims v. Lock-

duced to enter upon the execution of an oral agreement for the sale and purchase of land with the knowledge and acquiescence of the defendant, by taking possession, making improvements, and paying part of the purchase money, it was held that the refusal of the defendant to complete, was in the nature of a fraud, and that he was estopped to set up the statute of frauds in defence.¹ In another case the plaintiff, who had been the lessee of an inn and was still in possession, entered into a verbal agreement with the owner for a new lease at a specified rent, for the term of thirty years. Thereupon, the plaintiff agreed to sub-let for the whole of the term at an increased rent, and his sub-lessee expended money in alterations and repairs with the knowledge and approval of the owner. It was held, reversing the decision of the court below, that the outlay by the sub-lessee was as much a part performance of the agreement as if made by the lessee, and that the plaintiff was therefore entitled to a decree for specific performance.²

§ 281. *Property must have been enhanced in value.*—Improvements made by a vendee, to constitute part performance, must be of a permanent nature, and such as will

ett, 33 Ga., 9; Williston v. Williston, 41 Barb., 635; Hoffman v. Fett, 39 Cal., 109; Green v. Finn, 35 Conn., 178; Cummings v. Gill, 6 Ala., 562; Despain v. Carter, 21 Mo., 331; Neatherly v. Ripley, 21 Texas, 434; School District v. MacLoon, 4 Wis., 79; Tohler v. Folsom, 1 Cal., 207; Massey v. McIlwaine, 2 Hill (S. C.) Ch., 421; Finucane v. Kearney, Freeman (Miss.) Ch., 65; Outenhouse v. Burleson, 11 Texas, 87; Johnson v. McGruder, 15 Mo., 365; Blunt v. Tomlin, 27 Ill., 93; Mason v. Blair, 33 Ib., 194; Bomier v. Caldwell, Harring. (Mich.) Ch., 67; Moreland v. Lemasters, 4 Blackf., 383; Brock v. Cook, 3 Porter, 464; Edwards v. Fry, 9 Kansas, 417; Gregg v. Hamilton, 12 Ib., 333; Clayton v. Frazier, 33 Texas, 91; Johnson v. Bowden, 37 Ib., 621; Howe v. Rogers, 32 Ib., 218; Freeman v. Freeman, 43 N. Y., 34; Patterson v. Copeland, 52 How. Pr., 460; Perkins v. Hadsell, 50 Ill., 216; Shirley v. Spencer, 4 Gilman, 583; Thornton v. Henry, 2 Scam., 218; Ingles v. Patterson, 36 Wis., 373; Kelly v. Stanberry, 13 Ohio, 408; Haines v. Haines, 6 Md., 435; Vickers v. Sisson, 10 W. Va., 12; Tracy v. Tracy, 14 Ib., 243. "Rendering a party liable as a trespasser by repudiating an oral agreement with him, can not be a greater fraud than subjecting him by such repudiation to the loss of improvements." Piffner v. Stillwater & St. Paul R.R. Co., 23 Minn., 343. The following is a broad statement of the rule: "A verbal contract for the sale of land, will be enforced, where it is shown to have been fairly made, on a valuable consideration, a considerable portion of the purchase money paid, no unreasonable delay in paying the whole, possession taken, improvements made, no disposition shown by the plaintiff to evade the contract, and no evidence of hardship." D'Wolf v. Pratt, 42 Ill., 198.

¹ Potter v. Jacobs, 111 Mass., 32.

² Williams v. Evans, L. R. 19, Eq. 547.

not reasonably admit of compensation in damages;¹ and be consistent with, and made on the faith of, the contract.² Moreover, they must be beneficial to the property, and a sacrifice to the party making them.³ If, therefore, they do not exceed in value what the use of the premises is worth to the vendee, they are not, in themselves, any ground for the enforcement of the contract.⁴ So, the vendee, although he has been given possession, and made improvements, must, in order to entitle himself to specific performance, show performance, or a willingness and readiness to perform on his part.⁵ If the contract is such that it will not

¹ *Dougan v. Blocher*, 24 Pa. St., 28; *Hamilton v. Jones*, 2 Gill & Johns, 127. It has been maintained that as money spent in repairs is susceptible of being made good, such expenditures ought not to be regarded as part performance. *Sir William Grant, in Frame v. Dawson*, 14 Ves., 386. And see *O'Reilly v. Thompson*, 2 Cox, 271; and they will not be, when the acts relied on may be the subjects of an action for damages. *South Wales R.R. Co. v. Wythes*, 1 K. & J., 186. There are, however, many acts admitting of compensation, which yet amount to such part performance as that the court will enforce the parol agreement. Where the law makes payment of an auction duty essential to the contract, such payment will not constitute a part performance. *Buckmaster v. Harrop*, 7 Ves., 346; 13 Ib., 456; nor the payment of additional rent. *O'Herlihy v. Hedges*, 1 Sch. & Lef., 123; although it has been said that if shown or admitted to have been on the foot of the agreement, it is a circumstance of part performance. *Wills v. Stradling*, 3 Ves., 378; "But that would be to infer an agreement, not from acts, but from evidence, with regard to the acts, which seems clearly inadmissible." *Fry on Specif. Perform.*, 184.

² *Byrne v. Romaine*, 2 Edw. Ch., 445; *Peckham v. Barker*, 8 R. I., 17; *Spaulding v. Congelman*, 30 Mo., 177; *Wood v. Thornly*, 58 Ill., 464.

³ *Gangwer v. Fry*, 17 Pa. St., 491; *Moote v. Scriven*, 33 Mich., 500.

⁴ *Wack v. Sorber*, 2 Whart., 387; *Eckert v. Eckert*, 3 Penn., 332; *Ann Berta Lodge v. Leverton*, 42 Texas, 18. *Contra*, *Mims v. Lockett*, 33 Ga., 9. The improvements in such case would raise no presumption that the vendee in making them, relied on the contract of sale, and their loss would be no injury to him.

⁵ *Simmons v. Hull*, 4 Har. & M., 259. The purchase money must be paid or tendered according to the contract although the vendee may have been let into possession and made improvements. *Holmes v. Holmes*, 44 Ill., 168; *McClellan v. Darrah*, 50 Ib., 249. But see *King v. Thompson*, 9 Pet., 204; *Haines v. Haines*, 4 Md. Ch., 133; 6 Md., 435. Where, however, a purchaser of land by a parol agreement, who was in possession at the time, made permanent improvements, which added 50 per cent. to the value of the land, and also paid taxes, and assessments, and some interest money, it was held that there was a sufficient part performance to entitle him to a specific performance of the agreement. *Brown v. Jones*, 46 Barb., 400. A. and B., both of whom claimed certain land, entered into an agreement by which B. was to purchase the land at the public sales. A. offered B. money to pay for his, A.'s, portion of it, which B. declined to receive, saying that he had money enough, and would make the purchase and call on A. for the money, when he wanted it. The purchase was concluded, and A. made valuable improvements on his portion, with the knowledge of B., who recognized A.'s right, and desired to purchase his portion. A. tendered the purchase

be enforced, the vendor will be compelled to refund the purchase money, and pay for the improvements of the vendee, deducting therefrom the rents and profits.¹

§ 282. *Property improved by labor.*—Improvements to constitute part performance, or to entitle the vendee to compensation, need not necessarily consist of erections on the land, but may arise from skill and labor bestowed in cultivation. It appeared that the plaintiff and J. P., the

money, with a deed for B. to execute, which B. refused. In a suit for specific performance by A., it was held that he was entitled to a decree for conveyance. *McCoy v. Hughes*, 1 Greene, Iowa, 370. Where a tenant occupied an unfurnished house, made improvements, and paid rent for some time, under a parol agreement to execute a lease for ten years, the tenant to complete the house at his own expense, the court decreed a specific performance. *Farley v. Stokes*, 1 Pars. Sel. Cas., 422. A son living with his father who had a lease of the premises, entered into a parol agreement with the owner, for a portion of the land, built a house thereon, and occupied it with his family, but erected no division fence between his part and that of his father. Held, sufficient to take the agreement out of the statute of frauds. *Zimmerman v. Wengart*, 31 Pa. St., 401. Where a purchaser under a parol contract took possession of land worth not over twenty-five dollars, paid ten dollars down, and made improvements worth four hundred dollars, the land being partly given in consideration of the erection of a blacksmith-shop, it was held that there was a sufficient performance to take the case out of the statute, and specific performance was decreed. *Northrup v. Boone*, 66 Ill., 368. A husband and wife took possession of land under a parol contract for its purchase, the price to be paid within three months, and made improvements thereon worth more than the land, but against the vendor's objection until the purchase money should be paid. The vendor received payments from time to time without comment, and afterward tendered a deed demanding more than was due him. Held, that the purchasers were entitled to a decree for specific performance. *Patter v. Jacobs*, 111 Mass., 32. As a rule, where a parol agreement for the sale of land, is silent as to the possession, the land vacant, the entire consideration paid, and the agreement fully performed on the part of the vendee, leaving nothing for the vendor to do but to give a deed, there is an implied agreement that the vendee may at once take and hold possession. Where, in such a case, the vendee constructed roads to and upon the land, built a shanty, made some clearing, and paid the taxes, and his improvements thus made were probably equal in value to the consideration paid for the land, and the outlay would be lost to him, unless the defendant were compelled to perform his agreement, it was held that enough had been done by him to bring his case within the equitable rule as to part performance. *Miller v. Ball*, 64 N. Y., 286.

¹ *Lord Pengall v. Ross*, 2 Eq. Cas. Abr., 46, Pl. 12; *Fox v. Loughby*, 1 A. K. Marsh, 388; *Parkhurst v. Van Cortlandt*, 1 Johns Ch., 273; *Dunn v. Moore*, 3 Ired. Eq., 364; *Harden v. Hays*, 9 Pa. St., 151; *Baker v. Carson*, 1 Dev. & Batt. Eq., 381; *Albea v. Griffin*, 2 Ib., 9; *Goodwin v. Lyon*, 4 Porter, 297. The vendee has a lien on the land therefor, as against the vendor and creditors. *Rucker v. Levick*, 8 B. Mon., 566. But he is not entitled to retain possession until he is indemnified for his expenditures. *Harden v. Hays*, *supra*. So, where improvements are made by a tenant on the demised premises, with the knowledge and acquiescence of his landlord, an equity does not arise therefor entitling the tenant to remain in possession while such improvements are fit for use. *West v. Flanagan*, 4 Md., 36.

defendant's intestate, entered into a verbal arrangement by which the said J. P. agreed to purchase a certain farm for one thousand dollars. The plaintiff was to be put into possession of the farm, manage, cultivate, and improve it, and have the avails, pay the taxes, and pay to J. P. the annual interest on the one thousand dollars purchase money, until such time as he should choose to pay the principal, when, on the payment thereof, J. P. should convey the farm to him. J. P. purchased the farm, and the plaintiff performed the agreement on his part for nearly twenty years, when, on his offering to pay J. P. the interest, the latter said he would take no money, but would give the plaintiff a deed. But afterward he declined to convey the farm to the plaintiff, notwithstanding the plaintiff offered to pay him the purchase money, saying that all he wanted was the interest while he lived, and that on his death the farm would belong to the plaintiff. The farm was greatly enhanced in value by the labor and means of the plaintiff. The judgment of the court below, that the defendants convey the farm to the plaintiff on payment to them of the purchase price, with the interest thereon remaining unpaid, was affirmed with costs.¹ If a person enters into possession of, and works, land under a parol agreement for a written lease, it is such a part performance as takes the agreement out of the statute of frauds.² Where a person went on to land under a parol agreement for its use for eight years, upon condition that he would clear up and improve it, which he did, at a cost exceeding the yearly rent, it was held that he was entitled to a decree for specific performance.³

§ 283. *Improvements under a license.* — Although a parol license for a qualified use of land is valid, yet a permanent right to hold another's land for a particular object,

¹ Patterson v. Copeland, 52 How. Pr., 460. ² McCarger v. Rood, 47 Cal., 38.

³ Morrison v. Peay, 21 Ark., 110. A parol agreement to devise land will not be specifically enforced, although the party has expended money and performed services on the faith of such agreement. Harder v. Harder, 2 Sandf. Ch., 19.

and to enter upon it at all times without his consent, is an important interest which must in general be in writing.¹ "Were a contrary rule adopted, it is easy to see how, without questioning the credibility of witnesses, by a slight misunderstanding of the language of the ancestor, permission to make a temporary erection might be converted into a license to occupy indefinitely, and thus create an estate scarcely less than a fee."² But a parol license may become a valid and binding agreement, where the enjoyment of the license must necessarily be preceded by the expenditure of money, and the licensee has made improvements or invested capital in consequence of it.³ In such case, the contract having been performed on one part by permanent erections of considerable value, a court of equity will decree an assurance of the title stipulated; and possession by the party under the license will be notice to a subsequent purchaser or incumbrancer, of whatever title the one in possession may have, whether legal or equitable.⁴ Thus, a parol license to divert water from its ancient course for the use of a saw-mill was held irrevocable after an expenditure of money and labor on the basis of it; the principle being that the revocation would be a fraud.⁵

§ 284. *Improvements by donee.*—A parol promise to give land to another, accompanied by actual delivery of possession, will be specifically enforced where the promisee, induced by such promise, has made valuable improvements

¹ *Hewlins v. Shippam*, 5 Barn. & Cress., 221; 7 Dow. & Ry., 783; *Cocker v. Cowper*, 1 C. M. & R., 418; *Williams v. Morris*, 8 M. & W., 488; *Wood v. Leadbitter*, 13 Ib., 838; *Fentiman v. Smith*, 4 East., 107; *Bryan v. Whistler*, 2 Man. & Ry., 318; *Bird v. Higginson*, 6 Adol. & Ell., 824; *Ruffey v. Henderson*, 8 Eng. L. & Eq., 305; *Cook v. Stearns*, 11 Mass., 533; *Bridges v. Purcell*, 1 Dev. & Batt., 492; *Benedict v. Benedict*, 5 Day, 464; *Mumford v. Whitney*, 15 Wend., 380; *Brown v. Woodworth*, 5 Barb., 550; *Stevens v. Stevens*, 11 Metc., 251. *Contra*, *Wood v. Lake*, *Sayer*, 3; *Taylor v. Waters*, 7 Taunt., 374; *Clement v. Durgin*, 5 Me., 9; *Woodbury v. Parshley*, 7 N. H., 237.

² *Waterman on Trespass*, Vol. 2, Sec. 785.

³ *Hall v. Chaffee*, 13 Vt., 150; *McKellip v. McIlhenny*, 4 Watts, 317; *Lefevre v. Lefevre*, 4 Serg. & Rawle, 241; *Swartz v. Swartz*, 4 Pa. St., 353; *Sheffield v. Collier*, 3 Ga., 82; *Wynn v. Garland*, 19 Ark., 23.

⁴ *Pope v. Henry*, 24 Vt., 560.

⁵ *Rerick v. Kern*, 14 Serg. & Rawle, 267.

with the knowledge of the promisor.¹ If parties are in possession of land under an alleged parol agreement, a much weaker case will constitute a good defence, than would be required if they were complainants asking the active interposition of the court in their favor.² But to sustain a parol gift of land, as against the heirs of the donor, there must be clearly shown an executed intent to make the gift, possession taken, and improvements made on the faith of it.³ Where the owner of a small piece of ground verbally agrees with certain of his neighbors that if they will raise funds to build a school-house on the premises for the use of the neighborhood, he will contribute the ground, and they raise the funds, and build a house costing more than the value of the lot, it is the case not of a gift, but of a purchase for a valuable consideration.⁴

§ 285. *Improvements by child under gift from parent.*—Where a son goes into possession of his father's land, makes improvements, and pays the taxes, it is not to be inferred therefrom, in the absence of other evidence, that the father gave the son the land. Neither are loose declarations of the father calling the land his son's property, without explanation, sufficient evidence of a gift.⁵ A contract between a parent and child, from the nature of the relation, requires to be proved by a kind of evidence very different from that which may be sufficient between strangers. The terms must be clearly defined, and all the acts necessary to its validity, must have especial reference to it, and to nothing else.⁶ If, however, it be proved that large expenditures

¹ Freeman v. Freeman, 39 N. Y., 34.

² Haines v. Haines, 4 Md. Ch., 133; S. C., 6 Md., 435.

³ Johnston v. Johnston, 19 Iowa, 74. See *ante*, § 271.

⁴ Martin v. M'Cord, 5 Watts, 493.

⁵ Hugus v. Walker, 12 Pa. St., 173; Cox v. Cox, 26 Ib., 375.

⁶ Poorman v. Kilgore, 26 Pa. St., 365; Eckert v. Mace, 3 Penrose & Watts, 364. A child, like any other purchaser, must prove that the land was clearly designated, and that open, notorious, and exclusive possession was taken and maintained under and in pursuance of the contract. Shellhammer v. Ashbaugh, 83 Pa. St., 24. See Sower v. Weaver, 84 Ib., 262; King v. Thompson, 9 Pet., 204; *ante*, §§ 40, 265.

have been made, in permanent improvements on the land, with the knowledge of the father, and in consideration of his promise to convey the land, there is a good equitable consideration which will be protected and enforced. In such cases, the court relies not so much on the contract as on the acts done under it subsequently, on the faith that the promise will be kept by the other party.¹ A., a step-father of B., promised B., who was about to leave home, and commence business for himself, that if he would stay with A., work the farm, and take care of the family, he would deed him half of his farm. B. accordingly remained, and ever after during the life of A. and his wife, for more than thirty years, had the control and management of the farm, paid the taxes, built a house, and otherwise improved the property. It was held that as the agreement was certain as to the land and the consideration, and not founded on a vague expectation of benefit, but upon a distinct and positive promise, and there had been a substantial performance on the part of B., he was entitled to have it specifically enforced.²

¹ *Young v. Glendenning*, 6 Watts, 509; *Lobdell v. Lobdell*, 36 N. Y., 327; *Moore v. Pierson*, 6 Iowa, 279; *Bright v. Bright*, 41 Ill., 101; *Hardesty v. Richardson*, 44 Md., 617; *Galbraith v. Galbraith*, 5 Kansas, 402; *Willis v. Mathews*, 46 Texas, 478.

² *Twiss v. George*, 33 Mich., 253. Where a father, nearly twenty years before his death, made a parol gift of lands to his sons, and put them in possession, which they continued to hold during his life, making valuable improvements, and paying the taxes which were assessed in their respective names, it was held that the gift was valid. *Syler v. Eckhart*, 1 Binney, 378. In another case a father verbally agreed to convey to his son, then fifteen years old, a certain tract of land if the son would remain with him and work for him until he attained full age. The son continued to work until one year after he was twenty-one, when the father renewed the promise, and had the land transferred to the son on the tax list. The son, relying on his father's promise, took possession of the land, and made improvements on it worth four hundred dollars. The father died without executing a conveyance, and the son filed a bill for specific performance, which was decreed. *Atkinson v. Jackson*, 8 Ind., 31. Where the defendant offered to prove that her husband worked for the plaintiff, his father, about eight years after he became of age, at the plaintiff's request; that, in consideration thereof, and of love and affection, the plaintiff gave the farm by parol to his son, who took possession, made improvements, and paid the taxes, with the approbation of the plaintiff; that the plaintiff always treated his son as the owner, and, on his death-bed, informed the son and his wife that he would never disturb them; it was held that the evidence entitled the defendant not only to hold the farm, but to receive such a conveyance from the plaintiff as would vest in her

§ 286. *Distinction between gift and promise of a gift.*—Where a father having promised to give by will certain land to his son, the latter makes improvements upon it, but not in execution of the agreement, or at the father's request, the case is not taken out of the statute. A son, like a stranger, must be a purchaser for value given, or prejudice received, in order to take even a present agreement to convey, out of the statute; and he must equally be a purchaser, in case of a promise to devise him an estate—not by an officious expenditure in improvements—but by something done in execution of the contract, or at the promisor's request. The reason is, that a positive gift is an encouragement to treat the property as the donee's own, while a promise to give is not.¹

§ 287. *Compensation for improvements where gift insufficient.*—If an alleged gift of land be incapable of being enforced, the donor, before he can get possession, will be

and her surviving child, title to the farm according to their respective rights. *McCray v. McCray*, 30 Barb., 633. A father verbally agreed to convey to his son his farm, if the latter would remain on it, and maintain him, the father, during his life. The son fulfilled the conditions for fifteen years, when the father, becoming displeased with him, conveyed the farm to his two other sons. Held, that the part performance took the agreement out of the statute of frauds. *Davison v. Davison*, 13 N. J. Eq., 246. Where A. agreed, by parol, that if B., his son, would go and live on a certain portion of A.'s land, twenty-five acres, and clear and improve it, he would give B. a deed in fee of the twenty-five acres, which proposition B. accepted, went into possession, cleared a large portion of the tract, built on, and otherwise improved the same, and continued to reside on it for sixteen years, when he filed a bill for a specific performance of the agreement, it was held that he was entitled to a decree. *France v. France*, 8 N. J. Eq., 650. A father, having a life estate in certain land, but supposing that he was the owner of it in fee, devised it at his death to his son. The mother, wishing to carry out the mistaken devise of her husband, entered into a parol agreement with her son to convey the land to him, provided he would relinquish all interest in his father's personal estate. The son, having executed a receipt in full to his mother, as his guardian, for his share of said estate, in pursuance of the agreement, taken possession of the land, and made improvements thereon, it was held that he was entitled to a decree for specific performance. *Shepherd v. Bevin*, 9 Gill, 32. Where a father, having prevailed upon his daughter to move with her husband and children to a place near the father's residence, by a verbal agreement to purchase and convey to her certain land, bought the land and put them in possession of it, and they made valuable improvements thereon, and the father executed a deed of the land to his daughter, but did not deliver the deed to her during her life, it was held, in a suit for specific performance brought by the husband and children, that they were entitled to the relief asked. *Law v. Henry*, 39 Ind., 414. But see *Forward v. Armistead*, 12 Ala., 124.

¹ *McClure v. McClure*, 1 Pa. St., 374.

required to pay for the improvements.¹ Although in such case, the owner could not set up an independent claim to rents and profits, yet, when the occupier comes to be compensated for his improvements, the value of the rents and profits enter as a necessary element into the question of compensation.² Where some improvements were made by the donee, not such as an ordinary tenant would be likely to erect, and the defendants in their answer, while denying the agreement, averred their willingness to pay for such improvements, a decree was advised that it be referred to a master to ascertain and report an allowance.³

§ 288. *Acts of part performance connected with marriage.*—Since, under the statute of frauds, agreements in consideration of marriage, to be binding, must be in writing, it follows, that marriage does not in itself constitute such an act of part performance as will render a parol contract in relation to it valid.⁴ Previous to a marriage, it was agreed by parol that there should be a settlement of part of the wife's property, and that the husband should take the rest, which he did; but no settlement was made, and the wife afterward filed a bill to obtain a declaration of rights to certain property coming to her, and the husband in his answer admitted these facts, and a deed was then prepared purporting to be a settlement on the wife pursuant to the agreement, which was signed, but not acknowl-

¹ Evans v. Battle, 19 Ala., 398.

² Ridley v. McNairy, 2 Humph., 174.

³ Ackerman v. Ackerman, 24 N. J. Eq., 315.

⁴ Montacute v. Maxwell, 1 P. Wms., 618; Taylor v. Beech, 1 Ves. Sen., 297; Dundass v. Dutens, 1 Ves. Jun., 199; Redding v. Wilkes, 3 Bro. C. C., 400; and see remarks of Sir J. Romilly in Warden v. Jones, 23 Beav., 487. "The subsequent marriage is not deemed a part performance taking the case out of the statute, contrary to the rule which prevails in other cases of contract. In this respect, it is always treated as a peculiar case standing on its own ground." Story's Eq. Juris., Sec. 768. It was held, in some of the earlier English cases, that the necessity of written evidence of a promise in consideration of marriage, embraced mutual promises to marry. Philpot v. Walcot, Skinner, 24; 3 Levinz, 65; Freeman, 541. But this idea was afterward abandoned. In some of the States, the statute expressly excepts mutual promises to marry. Alabama, Rev. Code of 1867, Sec. 1862; California, Code, Sec. 1624; Kentucky, Rev. Sts., Ch. 22, Sec. 1; Minnesota, Sts. 1873, Vol. 1, p. 692, Sec. 6, Sub. 3; Nebraska, Sts. 1873, Ch. 25, Sec. 6; New York, Rev. Sts., 6th Ed., Vol. 3, p. 343; Wisconsin, Sts. 1871, Ch. 107, Sec. 2.

edged, by the wife. A suit having subsequently been brought by a person claiming under the settlement against the heir, it was held that the marriage was not a part performance, and that therefore the parol agreement was void, and all the subsequent proceedings null.¹ Parties entered into a parol agreement, in contemplation of marriage, that the wife should retain all her personal property, and her estate of dower in the lands of her former husband, and that in case she survived the person she was about to marry, she would relinquish all claim to his estate, real and personal. The husband having carried out the agreement on his part during his life-time, it was held that there was not such a part performance as took it out of the statute of frauds.² Cases often occur, however, in which acts connected with the marriage, amount to part performance independently of it, the marriage not being the sole act relied on; as where the husband makes a settlement in pursuance of a parol agreement entered into by him with his wife's father previous to the marriage.³ A father, before the marriage of his daughter, agreed by parol to give certain property to the married couple. The marriage having taken place, and absolute possession delivered to the son-in-law, he expended money on it, and it was held that there was a part performance of the alleged agreement.⁴ Where a

¹ *Lassence v. Tierney*, 1 M'N. & G., 551.

² *Finch v. Finch*, 10 Ohio Sts., 501. In a bill for specific performance, the complainant alleged that her father, long before her marriage, promised by parol to give her certain lands in case she married with his consent, and that, after her marriage, he put her in possession thereof, and she and her husband made certain improvements. The father having denied, in his answer, that he consented to the marriage, or gave her possession in pursuance of any promise, it was held that a decree for specific performance should be refused. *Worley v. Walling*, 1 Har. & J., 298. But it was held in the same State, that the delivery of real estate by a father to his daughter, in pursuance of an agreement, made by him with her in contemplation of her marriage, that he would give her the property as an advancement and marriage portion, and the fulfilment of the condition on her part by the marriage, took the agreement out of the statute of frauds; the marriage being deemed equivalent to the payment of the purchase money in a pecuniary contract. *Dugan v. Gitting*, 3 Gill, 138.

³ *Hammersley v. De Biel*, 12 Cl. & Fin., 45, 64.

⁴ *Surcome v. Pinniger*, 3 De G. M. & G., 571. And see *Floyd v. Buckland*, 1 Freem., 268.

parol promise was made by a father, to convey a certain lot to a lady who was about to marry his son, and she promised to furnish the money and build thereon a house, and under such arrangement they were married, and she having been given possession of the lot and built as agreed, it was held that a decree for specific performance of the contract to convey could be enforced.¹ But it has been held that the execution of a settlement is not an act of part performance, where the previous parol agreement was only between the parties subsequently married, and not between the intended husband and a third person.² Where, however, a man made an *ante-nuptial* agreement by parol with his intended wife, that, if he should die first, he would devise to her and her children all the property he should receive from her by their marriage, and he caused a will to be drawn in accordance with such agreement, and kept it by him, and afterward changed the disposition of his property by codicil, it was held such a part performance of the agreement as took the case out of the statute of frauds.³ Cohabitation may constitute part performance. Thus, in a deed of separation, the husband having covenanted with a trustee for the payment of an annuity to his wife, she returned to her husband a short time before his death, upon a promise made by him to her and her trustee, that, if she would do so, he would continue to pay the annuity, and would charge it on his real estate. He died without fulfilling his promise, and it was held, on the ground of part performance, that the parol agreement might be enforced against the devisees of the husband.⁴

§ 289. *Acts which may or may not constitute part performance.*—As acts done previous to the agreement can-

¹ Neale v. Neale, 9 Wall, 1.

² Warden v. Jones, 23 Beav., 487. *Contra*, Gough v. Crane, 3 Md. Ch., 119; 4 Md., 311.

³ Lowe v. Bryant, 30 Ga., 528. A parol agreement concerning lands for the settlement of a family controversy, executed on one side, may be specifically enforced on the other. Watkins v. Watkins, 24 Ga., 402.

⁴ Webster v. Webster, 27 L. J. Ch., 115; S. C., 4 De G. M. & G., 437.

not be regarded as done in pursuance of it, they do not constitute part performance.¹ The same is true of acts subsequent to the agreement, though in pursuance of it, if not strictly in performance, but only preparatory thereto. Acts of this kind may be, and usually are, the mere acts of the party doing them, the other party not necessarily being cognizant of them, and therefore not so bound by them as to make it fraudulent in him afterward to refuse to carry out the agreement.² Where it was a condition of the agreement that a party should obtain a release from a third person, which was done by the payment of a valuable consideration, it was held to be only a preparatory step, and not a part performance of the contract.³ In another case A. entered into a parol agreement with B. for the purchase of land. B. delivered a rent roll to A., which showed by its heading that an agreement had been made between them for the sale of the land at twenty-one years' purchase; and an abstract of title and deeds were also delivered to A., for the purpose of carrying out the sale. B. notified his creditors by letter that he had agreed to sell the land to A., took A. over the land, introduced the tenants to him as landlord, and declined to renew leases and do other acts as owner, referring the tenants to A. B. set up the agreement against an *elegit*, and obtained a verdict finding that he was not seized of the land. Nevertheless, a plea of the statute of frauds was sustained.⁴ Where, however, the agreement embraces acts between A. and B., and B. and C., and A. may be presumed to have an interest in respect to the acts between B. and C., part performance of this portion of the agreement will make it binding on A. The following case is in point: A lessor agreed by parol with a colliery company, his lessee, consisting of four members, of

¹ *Parker v. Smith*, 1 Coll. C. C., 608, 623.

² *Fry on Specif. Perform.*, 186. See *Redding v. Wilkes*, 3 Bro. C. C., 400; *Clerk v. Wright*, 1 Atk., 12; *Hawkins v. Holmes*, 1 P. Wms., 770; *Pembroke v. Thorpe*, 3 Swanst., 437, *n*.

³ *O'Reilly v. Thompson*, 2 Cox, 271. ⁴ *Whaley v. Bagnal*, 1 Bro. P. C., 345.

whom two were his sons, that one of his sons and one of the other members of the company should withdraw therefrom, and that thereupon he would take into consideration the reduction of the rent, and refer the matter to a competent person, whose report, if it seemed right, he would adopt and grant a new lease. The partnership was dissolved as agreed, and the two continuing partners released the others. It was held that as these acts could only be referred to the agreement, they took the case out of the statute of frauds, and specific performance of the agreement to grant the lease was decreed against the lessor's assignees in bankruptcy.¹

§ 290. *Time of performing agreement.*—With respect to the time of performance, it will be observed that the English statute makes it essential to the maintenance of an action, on any verbal agreement in relation to certain specified matters, that it is to be performed within the space of one year from the making of it; and the statutes of several of the States contain a similar provision; while in New York and some other States any such agreement, except contracts for leasing for a not longer period than one year, is declared to be void. Where the agreement is to be performed upon a contingency, and it does not appear from the agreement that it is to be performed after the year, a writing is unnecessary, for the reason that the contingency may happen within the year.² But if it is not the understanding and intention of the parties that the contract shall be performed within a year, the fact that it is possible to perform within that time will not take it out of the statute.³ So, an agree-

¹ Parker v. Smith, *supra*.

² Peter v. Compton, Skinner, 353; Fenton v. Emblers, 3 Burr, 1278; Wells v. Horton, 4 Bing., 40; Gilbert v. Sykes, 16 East., 150; King v. Hanna, 9 B. Mon., 369; Izard v. Middleton, 1 Dessaus Ch., 116; Thompson v. Gordon, 3 Strobb., 196; Peters v. Inhabs. of Westborough, 19 Pick., 365; Blake v. Cole, 22 Ib., 97; Howard v. Burgen, 4 Dana, 137; Ellicott v. Turner, 4 Md., 476; McLees v. Hale, 10 Wend., 426; Clark v. Pendleton, 20 Conn., 495; Artcher v. Zeh, 5 Hill, 200; Roberts v. Rockbottom, 7 Metc., 46; Lyon v. King, 11 Ib., 411; Doyle v. Dixon, 97 Mass., 209. See Quackenbush v. Ehle, 5 Barb., 469; Tolley v. Greene, 2 Sandf. Ch., 91.

³ Boydell v. Drummond, 11 East., 142; Herrin v. Butters, 20 Me., 119. *Contra*, Ellicott v. Turner, *supra*.

ment which cannot be performed according to its terms within a year, is within the statute, even if the act or promise which is the consideration for it may be performed within the year, or has been performed.¹ Where, therefore, the defendant, at the time the plaintiff gave him possession for the purpose of foreclosure of the mortgage which she had given him on the land, verbally promised that if he should "sell the place" he would pay her whatever he should receive for it beyond the amount due on his mortgage, and the foreclosure would not be complete so that he could sell the whole estate without her consent until the expiration of three years, it was held that as the agreement, according to a reasonable construction of it, could not be performed within a year, it was within the statute of frauds.²

¹ Lapham v. Whipple, 8 Metc., 59; Marcy v. Marcy, 9 Allen, 8; Pierce v. Paine, 28 Vt., 34.

² Feary v. Sterling, 99 Mass., 461. It has been held that if the contract can be fully performed on one side within a year from the time of making it, it is not within the statute. Donnellan v. Read, 3 Barn. & Adol., 899; Cherry v. Heming, 4 W. H. & G., 631; Holbrook v. Armstrong, 10 Me., 31; Bates v. Moore, 2 Bailey, 614; Gully v. Grubs, 1 J. J. Marsh, 387; Blanton v. Knox, 3 Mo., 241; Rake v. Pope, 7 Ala., 161; Johnson v. Watson, 1 Ga., 348; Hardesty v. Jones, 10 Gill & Johns, 404; Suggett v. Cason, 26 Mo., 221; Haugh v. Blythe, 20 Ind., 24. But it is difficult to understand how the foregoing view can be reconciled with the express language of the statute, which requires that the agreement shall be such an one as is capable of being *performed* within a year, which is not accomplished by its mere fulfilment on one side. The correctness of the doctrine has accordingly been denied. Sweet v. Lee, 3 Man. & Gr., 452; 4 Scott, N. R., 17; Bartlett v. Wheeler, 44 Barb., 162; Emery v. Smith, 46 N. H., 151. In Broadwell v. Getman, 2 Denio, 87, Beardsley, J., said: "Although the terms of the agreement may require full performance on one side within a year, I do not see how this can exclude it from the statute, the other side being incapable of execution until after the year has elapsed. The agreement is entire, and if it cannot be executed fully on both sides within the year, I think it is void. What difference does it make that one party can, while the other cannot, complete the contract within a year? Such an agreement is not in terms excepted from the statute, and the reason for the enactment applies to it with full force." The point commented on did not, however, arise in the case, as the agreement was not to be performed by either party within the year. In Talmadge v. Rensselaer & Saratoga R.R. Co., 13 Barb., 493, Willard, J., questions the correctness of the view taken in Broadwell v. Getman, *supra*, and seems to favor the opposite doctrine. But he placed his judgment upon other grounds. "It seems the settled rule, outside the State of New York, that if the contract is completely executed on one side at the time of making it, and if all that remains to be done on the other side is the non-payment of money, then the statute shall not apply merely on the ground that the money was not to be paid within one year." "The fact that the money was to be paid to an incumbrancer, instead of to the plaintiff directly, would not take the case out of the principle of

§ 291. *Proof of agreement.*—With reference to the proof required to establish a parol agreement, where specific performance is sought on the ground of part performance, it is scarcely necessary to say that the evidence must be clear and definite, and that if there is any such conflict of evidence as makes it uncertain what the material terms of the agreement were, the court will refuse to interfere.¹ Accordingly, where the agreement was attempted to be shown by a single witness, and his testimony differed from an entry of the terms in a pocket-book, the witness swearing that the consideration was one thousand guineas, exclusive of timber, while the entry contained no allusion to the timber, the suit was dismissed.² But where the case presented three different agreements: one set out by the plaintiff, another proved by him, and a third admitted in the answer, specific performance of the last-named agreement was decreed; though Lord Rosslyn expressed doubts as to the propriety of the decision, remarking that the bill ought in strictness to have been dismissed.³ Evidence is admissible in behalf of the plaintiff; notwithstanding it tends to establish a contract different from the one alleged in the bill, where the variance is favorable to the defendant, or, at least, will do him no injury; as where the difference consists of an admission by the plaintiff of something against himself, or the leaving out of something in his favor, or where the variance is not material from its expressing something that is implied, or has already been performed.⁴ Accordingly,

the rule.” *Curtis v. Sage*, 35 Ill., 22. In *Souch v. Strawbridge*, 2 C. B., 808, it was said, per Tindall, Ch. J., that to entitle the party to recover on his part performance within the year, when the other party was not bound to perform within the year, it must appear that the performance on the part of the plaintiff was accepted by the defendant, or that it went to benefit him.

¹ *Lindsay v. Lynch*, 2 Sch. & Lef., 1; *Evans v. Lee*, 12 Nevada, 393.

² *Reynolds v. Waring*, You., 346.

³ *Mortimer v. Orchard*, 2 Ves. Jun., 243. See *East India Co. v. Nuthumbadoo Veerasawmy Moodelly*, 7 Moo. P. C., 482, 497. “The inclination of Lord Cottenham’s mind seems to have been to struggle with apparently conflicting evidence, rather than to dismiss the bill when there had been part performance.” *Fry on Specif. Perform.*, 188, referring to *Mundy v. Jolliffe*, 5 My. & Cr., 167.

⁴ *Clifford v. Turrell*, 1 Y. & C. C., 138.

where the plaintiff, a tenant, alleged that he was to pay taxes and make necessary repairs, and the contract proved, contained no such stipulation, it was held that the variation was not a ground for dismissing the bill.¹ And the same was held, where the agreement set out by the plaintiff was to drain the lands generally, and to put certain arable land into pasture, and the only term proved was to drain where necessary.² So, specific performance may be decreed of a parol agreement for the sale of land, as between the parties to the agreement, where an agreement, though differing in some respects from that charged in the bill, is admitted, and the statute not relied on as a bar to the relief.³

§ 292. *Agreement how pleaded.*—In pleading a contract, it is sufficient to aver that there was a written agreement, without alleging that it was signed, that being implied.⁴ Accordingly, where an affidavit filed by the defendant contained the terms of the agreement, his signature though not alleged by the plaintiff was presumed by the court, as an affidavit must be signed as well as sworn to.⁵ But it has been held that unless the bill allege that the agreement is in writing, it will be open to demurrer.⁶ The allegation that the agreement was in writing, need not, however, necessarily be proved. The fact of the existence of an agreement so alleged will be sufficiently established by an admission in the answer of a parol agreement.⁷ If the complainant, in

¹ Gregory v. Mighell, 18 Ves., 328.

² Mundy v. Jolliffe, *supra*.

³ Baker v. Hollobaugh, 15 Ark., 322; Woods v. Dille, 11 Ohio, 455. And see Houser v. Lamont, 55 Pa. St., 311.

⁴ Rist v. Hobson, 1 Sim. & Stu., 543.

⁵ Barkworth v. Young, 4 Drew, 1.

⁶ *Ib.*; Whitchurch v. Bevis, 2 Bro. C. C., 559.

⁷ Spurrier v. Fitzgerald, 6 Ves., 555. Such an admission will bind the heir of the defendant, in case of the latter's death, upon a bill of revivor filed against the heir. Atty. Genl. v. Day, 1 Ves. Sen., 218, 221. Formerly, when a vendor died, and a suit was brought by his personal representative against the purchaser and the heir of the vendor, the admission by the purchaser was held to take the agreement out of the statute, not only against the purchaser, but also against the vendor's heir. Lacon v. Mertins, 3 Atk., 1; Potter v. Potter, 1 Ves. Sen., 437. But that is no longer considered to be law. Now, to give the real or personal representative the right to the specific performance of a contract to the prejudice of the other, there must have been, at the death of the contractor, an

his bill, states the making of a contract, without alleging that it was by parol, the court will presume that it was in writing and duly executed when the nature of the agreement is such that it could not be valid unless it were in writing. If the agreement be verbal, the plaintiff must set out the facts and circumstances which, when proved, will establish his claim to the relief prayed.¹ Where the agreement is denied by the defendant in his answer, the complainant must prove such an agreement as will be valid within the statute of frauds, or show such a part performance, or other equitable circumstances, as will take the agreement out of the statute, although nothing be said in the answer on the subject.² But if the making of the agreement is admitted by the answer, the defendant, in such answer, must insist that it was not in writing, and therefore not binding on him.³ And so, if equitable circumstances are alleged in the bill to take the agreement out of the statute, they must be controverted by the defendant. Formerly, specific performance was decreed when the parol agreement was confessed in the answer, notwithstanding the statute of frauds was insisted on as a defence.⁴ But it is now well settled, that in such case, the defendant is entitled to claim the protection

agreement legally binding him, and which the court would have enforced against him. *Buckmaster v. Harrop*, 7 Ves., 341; S. C., 13th lb., 456. Consequently, although a personal representative may be willing to carry out the contract, yet the parties interested are entitled to every objection which the deceased might himself have made if he were living. *Ibid.*

¹ *Small v. Owings*, 1 Md. Ch., 363.

² *Ontario Bank v. Root*, 3 Paige Ch., 478; *Cozine v. Graham*, 2 Ib., 177, 181.

³ *Gunter v. Halsey*, Ambl., 586; *Limondson v. Sweed*, Gilb., 35; *Rondeau v. Wyatt*, 2 H. Bl., 68; *Talbot v. Bowen*, 1 A. K. Marsh, 437; *Harris v. Knickerbacker*, 5 Wend., 638; *Coles v. Bowne*, 10 Paige Ch., 526; *Champlin v. Parish*, 11 Ib., 405; *Hollingshead v. McKenzie*, 8 Ga., 457; *Kirksey v. Kirksey*, 30 Ib., 156; *Dean v. Dean*, 9 N. J. Eq., 425; *Walker v. Hill*, 21 Ib., 191; *Artz v. Grove*, 21 Md., 456; *Dyer v. Martin*, 4 Scam., 146; *Tarleton v. Vietes*, 1 Gilm., 470; *Switzer v. Skiles*, 3 Ib., 529; *Garner v. Stubblefield*, 5 Texas, 552; *Woods v. Dille*, 11 Ohio, 455; *Minns v. Morse*, 15 Ib., 568; *Winn v. Albert*, 2 Md. Ch., 169; *McGowen v. West*, 7 Mo., 569; *Whiting v. Gould*, 2 Wis., 552; *Burt v. Wilson*, 28 Cal., 632; *Trapnall v. Brown*, 19 Ark., 39; *Vandwyne v. Vreeland*, 12 N. J. Eq., 142; *Esmay v. Gorton*, 18 Ill., 483; *Semmes v. Worthington*, 38 Md., 298; *Billingslea v. Ward*, 33 Md., 48.

⁴ *Child v. Godolphin*, 1 Dick., 39; *Child v. Comber*, 3 Swanst., 423, *note*. See *Cottingham v. Fletcher*, 2 Atk., 155; *Lacon v. Mertins*, 3 Ib., 3.

of the statute.¹ The defence that an agreement, admitted to have been made, is not in writing, must be pleaded as a fact, and distinctly put in issue. Stating, in the answer, that the contract is void in law, and that the defendant is not bound to perform the same, is not sufficient.² When letters are pleaded as constituting the agreement, no other evidence than the letters is admissible; so that if there is a failure to make out the agreement by them, the bill will be dismissed. But when letters are only introduced as evidence of the agreement, if they do not prove it, other evidence may be given.³

¹ Whitbread v. Brockhust, 1 Bro. C. C., 416; Whitchurch v. Bevis, 2 Ib., 559; Kine v. Balfie, 2 B. & B., 343; Rondeau v. Wyatt, 2 H. Bl., 68; Blagden v. Bradbear, 12 Ves., 466; Thompson v. Tod, Pet. C. C., 380; Argenbright v. Campbell, 3 Hen. & Munf., 144; Stearns v. Hubbard, 8 Me., 122; Winn v. Albert, *supra*; Barnes v. Teague, 1 Jones Eq., 277.

² Skinner v. McDouall, 2 De G. & S., 265; Vaupell v. Woodward, 2 Sandf. Ch., 143. And see Barry v. Coombe, 1 Pet., 640; Rhodes v. Rhodes, 3 Sandf. Ch., 283. A contract within the statute of frauds not being illegal, but only incapable of enforcement, the court will not interpose the statute. The defence, therefore, unless raised by the pleadings, will in general be regarded as waived. Fall v. Hazelrigg, 45 Ind., 576; Browne, St. of Fr., Sec. 508. A parol agreement to buy land sold under execution for the benefit of the judgment debtor, and return him whatever was realized on a resale, or that the land should be conveyed to him on paying the amount bid by the purchaser, was enforced, though free from fraud, where the statute of frauds was not pleaded. Dodd v. Wakeman, 26 N. J. Eq., 484. The statute of frauds may be objected by a demurrer for the want of sufficient facts. Carlisle v. Brennan, 67 Ind., 12. It has been held that the objection may be made at the trial without being previously pleaded. Suman v. Springate, Ib., 115. When the plaintiff alleges that there were several joint contractors, and the defendant in his answer denies the contract, but does not plead the misjoinder of parties defendant, the plaintiff may have judgment against such of the defendants as entered into the contract. Rutenberg v. Main, 47 Cal., 213.

³ Birce v. Bletchley, 6 Mad., 17. It has been held that if the defendant neglect to put in an answer, specific performance will be decreed on the bill as taken *pro confesso*. Newton v. Swazey, 8 N. H., 9. But this would not be in accordance with the existing practice of several of the States, by which, in such a case, the plaintiff would be required to establish his claim to a decree by satisfactory proof.

CHAPTER X.

MISREPRESENTATION, FRAUD, OR MISTAKE.

293. Nature and effect of misrepresentation in general.
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§ 293. *Rule as to false statements.*—The misrepresentation of a material fact, deliberately made with intent to deceive, constitutes fraud, for which there is a remedy both

at law and in equity.¹ And it is likewise fraud if recklessly made in the absence of knowledge of its truth or falsity, though uttered without a corrupt motive.² The requirements and modifications of the rule in equity relative to representations, will be considered presently. It may be stated here, that a misrepresentation made by one person to another in relation to a contract between them, may be a ground for the refusal of the court to decree specific performance at the suit of the former.³ So, the statement of a falsehood, or concealment of a truth, which, if correctly known, would probably have been a reason for making the terms of the contract different, will be good cause for rescinding the agreement.⁴ The same construction must

¹ *Broderick v. Broderick*, 1 P. Wms., 240; *Jarvis v. Duke*, 1 Vern., 19; *Adamson v. Evitt*, 2 R. & M., 71; *Jennings v. Broughton*, 6 De G. M. & G., 126; *McShane v. Hazlehurst*, 50 Md., 107.

² *West v. Jones*, 1 Sim. N. S., 207; *Taylor v. Ashworth*, 11 M. & W., 413; *Evans v. Edmonds*, 13 C. B., 786; *Rawlins v. Wickham*, 3 De G. & J., 304; *Hazard v. Irwin*, 18 Pick., 96; *Stone v. Denny*, 4 Metc., 151; *Lindsey v. Veasy*, 62 Ala., 421; *post*, §§ 505, 510.

³ *Edwards v. M'Leay*, 2 Swanst., 287; *Wilde v. Gibson*, 1 House of Lds., 605; *Stapylton v. Scott*, 13 Ves., 425; *Lord Gordon v. Lord Hertford*, 2 Mad., 106; *Clowes v. Higginson*, 1 Ves. & Beav., 524; *Monro v. Taylor*, 8 Hare, 56; *Swaisland v. Dearsley*, 29 Beav., 430; *Cockrane v. Willis*, L. R. 1, Ch. 58; *Harnett v. Yielding*, 2 Sch. & Lef., 549; *James v. State Bank*, 17 Ala., 69; *Fuller v. Perkins*, 7 Ohio, 196; *Solinger v. Jewett*, 25 Ill., 479; *Gilroy v. Alis*, 22 Iowa, 174; *Wuesthoff v. Seymour*, 22 N. J. Eq., 69; *Plummer v. Keppler*, 26 Ib., 481; *Snedaker v. Moore*, 2 Duvall, 542; *Cuff v. Dorland*, 50 Barb., 438; *Spurr v. Benedict*, 99 Mass., 406; *Hill v. Brower*, 76 N. C., 124. Where a person, by false and fraudulent representations as to the extent of his business, induces another to enter into a partnership with him for a definite time, as a court of law could afford no adequate relief, equity has jurisdiction to order the partnership articles to be cancelled, to restrain the defendant from using the plaintiff's name as a partner, and to order the defendant to repay the money advanced on account of the partnership. *Smith v. Everett*, 126 Mass., 304.

⁴ *White v. Flora*, 2 Overton, 426; *Woods v. Hall*, 1 Dev. Eq., 415; *Rayner v. Wilson*, 43 Md., 440; *Comyn on Contr.*, Vol. 3, p. 304. See *Addison on Con.*, 6th Ed., 84. The party injured may elect to rescind the contract, or, affirming it, to recover damages for the injury, or to insist on it as a defence to an action founded on the contract. *Thweatt v. McLeod*, 56 Ala., 375. For the rule which prevents specific performance being adjudged in cases of fraud, mistake, surprise, and hardship, see *Lynch v. Brockhoff*, 15 Abb. Pr., 357, *note*. Upon the principle that the plaintiff must show that the relief asked for by him is strictly equitable with reference to the parties and subject matter of the contract, the court will refuse to compel the specific performance of contracts founded upon fraud, imposition, or mistake; and where performance will operate as a surprise upon the party against whom it is sought to be enforced, courts will generally leave the parties as they find them, liable only to such redress as can be obtained at law. *Canterbury Aqueduct Co. v. Ensworth*, 22 Conn., 608.

be given and the same consequences will follow, when misrepresentations accompany a verbal agreement which is sought to be enforced, as if such misrepresentations had been inserted in a written contract.¹ When a person enters into an engagement on the faith of a misrepresentation made to him, the entire contract is thereby rendered invalid, it being impossible in such a case to determine how far the false statement may have operated to induce him to accept the proposition of the other party.² Consequently, an offer by the latter to waive any benefit or advantage he may have derived from the misrepresentation will not avail him.³ Where a person, having made an untrue statement in good faith, subsequently discovers his error, it is his duty to inform the other party of it; and if he does not, but suffers the other to act on the false statement, equity will regard it as a fraudulent misrepresentation.⁴ Where the defendant entered into and partly executed a contract to convey land to the plaintiff in exchange for tenements which the plaintiff represented were rented at certain rates, but which the defendant discovered were misstated, where-

The defendant may show by parol evidence that the written instrument sought to be enforced against him does not correctly express the agreement of the parties, but that there is some material omission, insertion, or variation, contrary to their intention or understanding. *Marquis of Townshend v. Stangroom*, 6 Ves., 328; *Ramsbottom v. Gosden*, 1 V. & B., 165; *Rich v. Jackson*, 4 Bro. C. C., 514; *Gillespie v. Moon*, 2 Johns Ch., 585. A broken stipulation as to time, to furnish a defence to a suit for specific performance, must be of such a character as to constitute a condition precedent to the petitioner's right to enforce the contract, or be such as on its non-fulfilment without reasonable excuse, to render in terms the contract void; or in some other manner to make it clearly inequitable, under circumstances of fraud, mistake, surprise, delay, gross neglect, bad faith, or other manifest unconscientiousness, that the petitioner should have a decree. *Quinn v. Roath*, 37 Conn., 16. A court of equity has jurisdiction to rescind a contract where a party purchased goods by false representations, and gave his note without intending to pay. But it has no jurisdiction to direct a seizure of the goods, and in that way to enforce payment of the note, even where the goods can be identified in the hands of the purchaser; the remedy in such case being at law. *Monroe v. Cutter*, 9 Dapa, 193.

¹ *Thompson v. Tod*, 1 Pet. C. C., 380. Fraud may be committed by an intentional misrepresentation either of the law or the facts. When that is established, the court will not only refuse to decree specific performance of the agreement, but will relieve against it. *Broadwell v. Broadwell*, 1 Gilman, 599.

² *Reynell v. Sprye*, 1 De G. M. & G., 709; *Stewart v. Alliston*, 1 Meriv., 26.

³ *Clermont v. Tasburgh*, 1 J. & W., 119.

⁴ *Reynell v. Sprye*, *supra*; *Clapham v. Shillito*, 7 Beav., 149.

upon he refused to complete the contract, it was held that the suit could not be maintained, although it appeared that such representations were not fraudulent, and that the plaintiff had offered compensation for the deficiency in the rent.¹

§ 294. *Examples of misrepresentation.*—Among the numerous cases illustrative of the subject, the following may be taken as examples: Where, in a suit for the specific performance of an agreement to exchange city property for a farm in a distant State, it appeared that while the treaty between the parties for the exchange was in progress, both the defendant and his wife were anxious to know whether fever and ague existed in the vicinity of the farm, and inquired of the plaintiff as to it, who said that there was none there, and that the healthfulness of that locality was good in this respect, and it was evident that the defendant and his wife made the absence of that disease a material ground for accepting the offer of the plaintiff, the bill was dismissed with costs.² A. was induced to purchase from B. certain land on the Ohio river, by the representations of B., that there was a productive coal-mine on the land, capable of being worked advantageously, and with facility, when in fact there was no coal-mine on the land, though there was coal adjacent thereto in the bed of the river, which could only be obtained at great cost and hazard. It was decreed that B. be perpetually enjoined from prosecuting any suit to recover an annuity which A. had

¹ Boynton v. Hazelboom, 14 Allen, 107. Where a person agreed to convey three lots of land, and represented that two of the lots were subject to a mortgage for seventeen hundred and fifty dollars each, and the third to a mortgage for sixteen hundred dollars, it was held that he could not maintain a suit for specific performance, it appearing that the mortgages were for different sums on each lot, although in the aggregate they amounted to the sum represented. Park v. Johnson, 7 Allen, 378.

² Holme's Appeal, 77 Pa. St., 50. Where a party to a contract to convey land for a barge and steamboat interest, was induced to enter into such contract through false representations as to the quality and capacity of the barge, and the condition of the liens on the steamer, the court refused a decree for specific performance. Wells v. Millett, 23 Wis., 64. See Carmichael v. Vandebur, 50 Iowa, 651.

agreed to pay B. for twenty years, in case the mine proved productive.¹ Where the owner of prairie land which was destitute of timber, and for that reason not valuable, falsely represented to another, that the tract included other land which was well timbered, and thereby induced the latter to purchase the property, the contract of sale was rescinded.² So, where the vendee induced the vendor to contract for the sale of wild lands, fraudulently misrepresenting to the vendor their value, knowing at the time that the vendor had not seen them for many years, the court declared the contract void.³ A. sold to B. a farm, receiving in payment certain shares in a corporation which were in fact valueless, but which were falsely represented by B., and also by C. and D., who were concerned in the company, to be worth several thousand dollars. On a bill in equity by A., it was held that the sale must be rescinded, the shares be reconveyed to B., and the farm to A., and a master was directed to report the amount of rents and waste, after deducting the cost of permanent improvements which should be allowed to A. by B.; that if neither the land nor the shares could be reconveyed, the master should examine and report the damages sustained by A., and a decree be entered against the defendants for the amount; and that if the farm could be reconveyed, and not the shares, the former should be done, and the net income ascertained and paid, deducting therefrom the value of the shares, if anything, and interest.⁴

¹ Dale v. Roosevelt, 5 Johns Ch., 173, Affd. on Appeal, 2 Cowen, 129. In this case there was no evidence of fraud, or that the misrepresentation was intentional.

² Hickey v. Drake, 47 Mo., 369.

³ Kelley v. Sheldon, 8 Wis., 258.

⁴ Warner v. Daniels, 1 Woodbury & Minot, 90. A person who induces another to execute an instrument by false and fraudulent statements as to its legal effect, will not be permitted to avail himself of such instrument to the injury of the other. Therefore, where, after the commencement of an action, the plaintiff, who could not read, was induced to execute a discharge of all demands, by the false and fraudulent representations of the defendant that the discharge would not affect the existing suit, it was held that the plaintiff was entitled to judgment. Chestnut Hill Reservoir Co. v. Chase, 14 Conn., 123. Accommodation indorsers of a bill, took from the debtor a deed of trust to a trustee as security. After the bill was negotiated, they indorsed a new bill, and agreed

§ 295. *When party not entitled to relief.*—The rule under consideration is to be taken with this qualification, that when the complainant has been overreached by the respondent in a material degree, by impositions, concealments, or misrepresentations, on which the complainant properly relied, he is entitled to relief, unless there has been great and unexpected delay in seeking it, or there is an adequate remedy at law, or a condition of the property in controversy which renders it impracticable for the court, on any sound principle, to grant redress.¹ In such case, all the circumstances, and the character and relations of the parties, are proper subjects of inquiry.² If between the time of making the contract and applying to rescind it great changes have taken place in the value of the property, the lapse of time is an important consideration. Where, however, there has been no material change in the property since the contract, so that it can be restored by the purchaser in as good condition as he received it, and he offers to rescind the contract within a reasonable time after he has ascertained that the representations were untrue, lapse of time furnishes no well-grounded objection to the relief sought.³

§ 296. *Failure of plaintiff to fulfil a promise.*—One of the most usual cases in which the court remains passive is where, though there is no doubt as to the contract itself, and as to the plaintiff's legal right under it, yet the defendant has been induced to enter into it in consequence of some independent engagement by the plaintiff to do some other act which he has failed to perform. If, under such

for a new deed of trust on the same property, of which the trustee had notice. The original deed was altered as to date, and duly recorded. Subsequently the trustee, being assured by the debtor that the former deed was discharged, took a deed of trust for his own benefit on the same property. It was held that the property should be sold for the benefit of the *cestuis que trust* in the original deed. *Gazzard v. Webb*, 4 Porter (Ala.), 73.

¹ *Colt v. Woolaston*, 2 P. Wms., 154; *Blain v. Agar*, 1 Sim., 37, 45; S. C., 2 Ib., 289.

² *Neville v. Wilkinson*, 1 Bro. C. C., 546; *Roosevelt v. Fulton*, 2 Cow., 129.

³ *Taylor v. Fleet*, 1 Barb., 47, per Harris, J.

circumstances, the plaintiff does not do that which he has undertaken, even though it be an engagement incapable of being legally enforced, equity will leave him to obtain such redress as he may be entitled to at law.¹ It has accordingly been held, that where real estate has been bought upon representations made by the vendor as to prospective improvements upon adjoining land, or as to the latter being used in such a way as to enhance the value of the land sold, specific performance will not be decreed in behalf of the vendor unless he makes good his representations.² Upon the same principle, a person having contracted to take the lease of premises upon the representation of the owner that they were suitable, or that he would make them suitable, for a certain purpose, which was not done, it was held that the owner was not entitled to specific performance.³ Where a person purchased land at a very high price, on the faith of the representation of the vendor that permanent improvements were to be made in the immediate vicinity, and the vendor failed to make the promised improvements, it was held that he could not enforce payment of so much of the purchase money as exceeded the value of the land without the improvements.⁴ If, however, there are independent covenants and agreements, a breach of one may not afford an answer to a claim for specific performance.⁵

§ 297. *How deception may be practiced.*—The misrepresentation need not necessarily have been by anything spoken. It may be by conduct.⁶ As where fraudulent experiments are made, on the faith of which an agreement is entered

¹ Myers v. Watson, 1 Sim. N. S., 523.

² Beaumont v. Dukes, Jacob, 422.

³ Lamare v. Dixon, 6 House of Lds., 414.

⁴ Rogers v. Salmon, 8 Paige Ch., 559.

⁵ Gibson v. Goldsmid, 5 De G. M. & G., 757.

⁶ "A nod, or a wink, or a shake of the head, or a smile from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, is a fraud at law. So, *a fortiori*, would a contrivance on the part of the purchaser, better informed than the vendor of the real value of the subject to be sold, to hurry the vendor into an agreement without giving him the opportunity of being fully informed of its real value, or time to deliberate and take advice respecting the conditions of the bargain." Lord Campbell in Walters v. Morgan, 3 De G. F. & J., 724.

into ;¹ or where a party is deceived by pretended maps or plans of the property.² The whole of a tract of land, excepting a small portion, was divided into lots by the owner and put up for sale, one of the conditions being that no public house should be erected thereon, and no trade be carried on upon the property. In the particulars of sale the property was described as the M. estate, and there was nothing to indicate that any part of the vendor's estate was excluded. In the plan annexed to the particulars the different lots were colored ; but not the excepted piece, which was not marked with the vendor's name, though the names of the adjoining owners were printed. It was unlikely that a public house would be built on any of the adjoining estates. It was held that a purchaser of one of the lots, consisting of a dwelling-house a hundred yards distant from the excepted piece of land, who had bought in the belief that the whole of the vendor's estate was included in the particulars of sale, could not be compelled to complete his purchase unless the vendor would enter into a restrictive covenant as to the excepted piece of land.³

§ 298. *Suppression of facts how regarded.*—A species of misrepresentation consists in the concealment of a material fact which it is the duty of one party to the contract to communicate to the other ;⁴ for the suppression of such a fact by a person who knows that the other party to the transaction has no idea of anything of the kind, is as much a fraud as if the existence of the fact were expressly denied.⁵ The vendor is bound to inform the purchaser of all the incidents to which the property is subject, in language intelligible to the common understanding.⁶ When the vendor's statements are ambiguous, the purchaser is not required to

¹ Lovell v. Hicks, 2 Y. & C. Ex., 46. ² Peacock v. Penson, 11 Beav., 355.

³ Bascomb v. Beckwith, L. R. 8, Eq. 100.

⁴ Edwards v. M'Leay, 2 Swanst., 287 ; Tapp v. Lee, 3 B. & P., 371 ; Oakes v. Turquand, L. R. 2, House of Lds. 326.

⁵ Conyers v. Ennis, 2 Mass., 236. ⁶ Sheard v. Venable, 36 L. J. Ch., 922.

ascertain their meaning at his peril.¹ But the concealment, to be deemed material, must be relative to a matter which the party was bound to disclose, and which, if it had been known to the other party, would probably have prevented his entering into the contract.² When a person negotiates commercial paper payable to bearer, or under the blank indorsement of another person, he warrants that he has no knowledge of any facts which prove the paper to be worthless on account of the failure of the maker, or from its having already been paid or otherwise become void, and any concealment in relation thereto, would constitute a fraud.³ The mere failure of the purchaser to disclose his insolvency, is not deemed fraudulent so as to affect the title to the property purchased. But if there is a condition of known insolvency undisclosed, and an existing intention on the part of the purchaser not to pay for the property, fraud may be affirmed.⁴ Where a merchant, knowing that he is insolvent, buys goods without disclosing the fact, there being no inquiry made, he is not necessarily guilty of fraud, as he may honestly believe that he can extricate himself from his embarrassments.⁵ If, however, a purchaser who is insolvent obtains goods without intending to pay for them, it is a fraud upon the vendor, and the property in the goods will not be changed.⁶ So, if a merchant in good credit buy goods upon his own responsibility, he knowing at the time that he is insolvent, but concealing the fact from the seller for the purpose of placing them in the hands

¹ *Drysdale v. Mace*, 5 De G. M. & G., 107; *Martin v. Cotter*, 3 J. & L., 507; *Swaisland v. Dearsley*, 29 Beav., 430.

² *Haywood v. Cope*, 25 Beav., 140; *Hallows v. Fernie*, L. R. 3, Eq. 536; *Kent v. Freehold Land & Brick-Making Co.*, 4 Ib., 598; *Young v. Bumpass*, *Freem. (Miss.)*, Ch., 241; *Pearett v. Shawbhut*, 5 Miss., 323; *Steele v. Kinkle*, 3 Ala., 352; *Jouzin v. Toulmin*, 9 Ib., 662. Where a man, having contracted for the sale of a vessel "with all faults," removed her from the ways in which she lay, and kept her afloat, in order to conceal the fact that her bottom was unsound, it was held that the purchaser was entitled to rescind the sale on account of the fraud. *Baglehole v. Walters*, 3 Camp., 154; *Schneider v. Heath*, Ib., 506.

³ *Brown v. Montgomery*, 20 N. Y., 287. ⁴ *Wright v. Brown*, 67 N. Y., 1.

⁵ *Nichols v. Pinner*, 18 N. Y., 395.

⁶ *Durell v. Haley*, 1 Paige Ch., 492.

of an assignee for the benefit of other creditors, it is such a fraud as avoids the sale.¹

§ 299. *Defence that material facts were concealed.*—Where a party to a contract has either intentionally or accidentally concealed facts on which the contract is based, he cannot come into court to enforce it against the other party.² Specific performance of a contract of sale will not be decreed where the purchaser at the time of making the bargain was ignorant of a substantial defect with respect to the nature, character, situation, extent, or quality of the estate, and in regard to which he was not put upon inquiry.³ Plaintiff purchased of defendants at auction a lot in the city of New York, paying ten per cent. of the purchase price. Printed handbills were issued and circulated by the defendants, prior to the sale, containing a diagram of the lot representing it to be twenty-five by one hundred feet, and its size was so stated in the printed text. Plaintiff purchased, relying upon this handbill, without examining the lot. The terms of the sale described it as “twenty-five feet front and rear, more or less.” The lot was to be conveyed by warranty deed free of incumbrance. A building upon the adjoining lot encroached upon the lot, and had stood there for more than twenty-five years, which was known to the defendants, but no mention thereof was made in the handbills, or in the terms of sale, or at the time of the sale. Plaintiff refused to complete the sale, and brought this action to recover the percentage paid. Defendants set up the contract, alleged a readiness and tender of performance, and asked for a specific performance on the part of the plaintiff. It was held, that plaintiff’s bid having been obtained by the suppression of a material fact, defendants could not enforce the purchase; that plaintiff was entitled both to a title to and the possession of the whole lot; not

¹ *Lupin v. Marie*, 2 Paige Ch., 169.

² *Pusey v. Desbouvrie*, 3 P. Wms., 315; *Railton v. Mathews*, 10 Cl. & Fin., 934; *Willis v. Willis*, 17 Sim., 218; *Barksdale v. Payne*, Riley Ch., 174.

³ *Ellicott v. White*, 43 Md., 145.

simply a right of action for its recovery, which, conceding the title to be good, was all that defendants could convey as to the part encroached upon; and that the insertion of the words "more or less" in the terms of sale did not, under the circumstances, affect the rights of the parties.¹ So, where the purchaser files a bill in equity to enforce a specific performance of the contract of sale, the court will not aid him if he has intentionally concealed a material fact from the vendor, the disclosure of which would have prevented the making of the agreement, but he will be left to his remedy at law. Although the mere suppression of a material fact by one party, of which he knew the other was ignorant, be not of itself sufficient to avoid the contract on the ground of fraud, yet slight circumstances in addition to the intentional concealment of a fact, have been deemed sufficient to constitute a fraud upon the other party.² Complainant filed a bill for the specific performance of a contract for the sale of land. Defendant alleged, by a cross bill, that the complainant had concealed the fact that there was a salt spring on the land which was worth a great deal more than the price agreed to be given, and that the plaintiff had failed to pay or tender the consideration, which was to have been discharged in salt. It was held that the bill should have been dismissed, and the plaintiff left to his remedy at law.³ The purchaser is not bound to know that the description in the contract and deed does not embrace all of the land orally agreed to be sold; and if a portion of the premises is fraudulently omitted, and the purchaser, being deceived, accepts the deed, pays the purchase money, and goes into possession, he may, notwithstanding the statute of frauds, maintain a suit for the specific performance of the agreement.⁴ A person bought real estate known as "the Knapp house property," supposing that he was obtain-

¹ King v. Knapp, 59 N. Y., 462.

² Turner v. Harvey, Jacob, 178.

³ Bowman v. Irons, 2 Bibb., 78. And see Bowman v. Bates, *ib.*, 47, in which, on a similar state of facts, the contract of sale was set aside.

⁴ Beardsley v. Duntley, 69 N. Y., 577. See *ante*, § 254.

ing the whole of it, and the vendor was well aware that the vendee entered into the contract with that understanding. The purchaser having discovered, after he had taken possession, that his deed did not embrace the whole property, filed a bill to compel the vendor to convey the omitted portion, and it was held that he was entitled to the relief sought.¹ Where a deed from a husband to his wife, omitted the name of the town in which the land conveyed lay, and the husband introduced evidence to show that he was importuned to execute the deed, that it was without consideration, and that he purposely left out the name of the town, the wife supposing that it was correct, it was held that a person claiming under a devisee of the wife, was entitled to have the deed corrected.² Of course, if the purchaser does an act, or makes a declaration, for the purpose of misleading the vendor, and preventing him from ascertaining the real situation of the property, and at the same time conceals from him a fact which he knows to be material, he is guilty of a fraudulent deception.³ Where a person living near land which he was desirous of purchasing, and with the value of which he was acquainted, visited the owner, a clergyman residing in a distant State, who knew very little about the property, by means of letters of introduction won the clergyman's confidence, by misrepresentations prevented his taking time to inform himself, and, by deceiving him as to the real value of the land, induced him to enter into a contract for its sale for very much less than it was worth, a bill filed by the purchaser for specific performance was dismissed with costs.⁴

§ 300. *Fraud a ground of rescission.*—If a party in-

¹ Goodenow v. Curtis, 18 Mich., 298.

² Stewart v. Brand, 23 Iowa, 477.

³ Livingston v. Peru Iron Co., 2 Paige Ch., 390. It has been held that if a man, having committed a serious trespass upon his neighbor's property, and wishing to screen himself from the consequences, makes a proposal for the purchase of the property, he is bound, before entering into a contract with the owner, to inform him of the circumstances of the case. Phillips v. Homfray, L. R. 6, Ch. 770, per the lord chancellor.

⁴ Swimm v. Bush, 23 Mich., 99.

duces another to enter into an agreement by the fraudulent concealment or perversion of material facts, the latter will be entitled to a rescission of the contract.¹ A. sold to B. the lease of a house without showing B. the lease, or informing him that it contained a covenant for the termination of the lease in case of the destruction of the premises by fire. The house having shortly afterward been burned, the vendor was enjoined from collecting the purchase money, and decreed to deliver up to be cancelled the notes which had been given therefor.² A., who was the cashier of a bank, borrowed of B. and C. four thousand one hundred dollars, to be repaid on demand, with interest; and, as security, delivered to them stock of a fire insurance company. A few months afterward, the bank failed, and it was ascertained that A. was a defaulter and insolvent, he having communicated the same to the bank commissioners. The fact that A. was a defaulter, was kept secret by the bank commissioners, in order to aid A. in securing his indebtedness to the bank; and he obtained the stock from B. and C., representing that he wanted it for a particular purpose, promising to replace it by other security, his real object being to provide for the bank debt and avoid public exposure. He thereupon immediately transferred the stock to the bank, and it was placed by the bank among its papers and securities. It was held that as the stock was fraudulently procured from B. and C., it must be restored to them.³

§ 301. *Right of party to be told of defects.*—The rule that when a purchaser has examined property containing defects which can be discovered by ordinary vigilance, he is not entitled to relief on account of such defects, does not apply when fraudulent means have been employed to conceal the defects. The obligation to communicate facts ceases when each party has an opportunity of examining

¹ Pollard v. Rogers, 4 Call, 239.

² Snelson v. Franklin, 6 Munf., 210. See M'Niel v. Baird, Ib., 316.

³ Rawdon v. Blatchford, 1 Sandf. Ch., 344.

for himself, and undertakes to do so, without relying on the statements of the other. But it is not the mere opportunity to examine which relieves the other party from the duty to disclose. For although the opportunity exist, yet if the purchaser is led to repose confidence in the vendor, and does not examine for himself, the duty to disclose defects is equally obligatory, and the vendor will be held bound for all statements and all undue concealments.¹

§ 302. *Purchaser need not give vendor information.*—Notwithstanding it is the duty of the vendor to communicate to the purchaser any circumstance which diminishes the value of the property, the purchaser is not bound to announce what may increase its value. If, for instance, the purchaser knows that there is a mine in the land of which the vendor is ignorant, he is not bound to apprise him of the fact.² Where a first mortgagee with power of sale, arranged for the advantageous disposal of part of the mortgaged property, and then purchased at a reduced price the interest of the second mortgagee, without acquainting him with his arrangement for sale, a bill filed by the second mortgagee to set aside the sale on the ground of concealment by the purchaser, was dismissed.³ Although an action for deceit cannot be maintained against the purchaser, for misrepresenting the vendor's chance of sale, or of obtaining a better price than that offered;⁴ yet, in equity, the purchaser must not let drop a single word to mislead the vendor, or go beyond silence.⁵ Where a solicitor, in buying of a person in embarrassed circumstances, who acted without professional advice, falsely represented that the nature and title of the property were such that no one

¹ Hall v. Thompson, 1 Sm. & Marsh, 443, per Sharkey, J.

² Fox v. Mackreth, 2 Bro. C. C., 400, 420; Wilde v. Gibson, 1 House of Lds., 605; Walters v. Morgan, 3 De G. F. & J., 723; Laidlaw v. Organ, 2 Wheat., 178; Perkins v. McGavock, Cooke, 415; Livingston v. Peru Iron Co., 2 Paige Ch., 390; Smith v. Beatty, 2 Ired. Eq., 456; Harris v. Tyson, 24 Pa. St., 347; Butler's Appeal, 26 Ib., 63.

³ Dolman v. Nokes, 22 Beav., 402.

⁴ Vernon v. Keys, 12 East., 632.

⁵ Turner v. Harvey, Jac., 169, 178; Davies v. Cooper, 5 My. & Cr., 270.

but a professional man would purchase it, a decree for specific performance was refused.¹

§ 303. *Conditions on which false statement relieved against.*—A representation, to be a ground for the interposition of the court in behalf of the party alleged to have been injured by it, ought first to be shown to be untrue; second, the party making the representation, should have had no knowledge of the truth of the statement; third, the false statement ought to have been made to induce the other party to enter into the contract; fourth, the party to whom the statement was made, must have relied on it; fifth, the misrepresentation must have made the contract unconscionable.

§ 304. *Must be shown that statement was false.*—The representation must be of matter of fact, and not of a matter of law, opinion, judgment, or mere intention; unless the expression of opinion constitutes a warranty, or that of intention a contract; or unless in dealing with another, an unconscionable advantage is taken of his ignorance of his legal rights.² Whether the misrepresentation be claimed to have been made by means of a verbal or written statement, it must, of course, be shown that the statement was actually untrue, otherwise there could have been no misrepresentation. While the same evidence of misrepresentation is required in proceedings at law, and for setting aside a contract in equity, somewhat less will be deemed a sufficient defence to a suit for specific performance. A statement, as we have seen, may be false, without any positive assertion, by the intentional withholding of facts, and thereby producing an erroneous impression.³ A representation, though literally true, by being calculated to mislead

¹ Davis v. Abraham, Week. Rep., 1856-1857, 465. See Masterton v. Beers, 1 Sweeney, 406; Byard v. Holmes, 5 Vroom, 297.

² Adam's Equity, 176; Kerr on Fraud and Mistake, 90; Leake on Con., 182; Curry v. Keyser, 30 Ind., 214; Townsend v. Coales, 31 Ala., 428; Colter v. Morgan, 12 B. Mon., 278; *post*, § 314.

³ Brandling v. Plummer, 2 Drew, 430; Pope v. Garland, 4 Y. & C. Ex., 401; Spinner v. Walsh, 10 Ir. Eq., 386; *ante*, § 298.

the person to whom it is made, may be in substance a misrepresentation.¹ As where it is asserted that there is an abundant supply of water on the property, when, in fact, the property, though well supplied with water, derives its supply from the water-works of a town.² If one of several representations, all more or less likely to make an impression, is false, it vitiates the entire transaction; as it is impossible to say that the untrue statement may not have had a controlling influence in determining the line of conduct of the party to whom it is addressed.³

§ 305. *Stating what was not known to be false.*—When a vendor, intending to deceive, asserts something material as a fact of which he has no knowledge, which alleged fact has no existence, and the vendee is induced by the false assertion to make the purchase, the representation is in a legal sense fraudulent.⁴ So, if a representation be made of a matter material to the contract, which is untrue, to the damage of the other party, who relies on it, such representation will have the force and effect of positive fraud in a proceeding to rescind the contract, or in an action for, or defence founded on the fraud, whether the falsity of the rep-

¹ Kerr on Fraud and Mistake, 92. And see *Edwards v. Wickwar*, L. R. 1, Eq. 68; *Ross v. Estates Investment Co.*, 3 Ib., 135; *Colby v. Gadsden*, 15 W. R., 1185; *Chester v. Spargo*, 16 Ib., 576; *Legge v. Croker*, 1 Ba. & Be., 506; *New Brunswick, etc., R.R. Co. v. Conybeare*, 9 House of Lds., 711. In *Doggett v. Emerson*, 3 Story, 733, Story, J., said: "It is equally promotive of sound morals, fair dealing, and public justice and policy, that a vendor should distinctly comprehend, not only that good faith should reign over all his conduct in relation to the sale, but that there should be the most scrupulous good faith, an exalted honesty, or, as it is often felicitously expressed, *uberrima fides*, in every representation made by him as an inducement to the sale. He should literally in his representation tell the truth, the whole truth, and nothing but the truth. If his representation is false in any one substantial circumstance going to the inducement or essence of the bargain, and the vendee is thereby misled, the sale is voidable, and it is usually immaterial whether the representation be wilfully and designedly false, or ignorantly or negligently untrue. The vendor acts at his peril, and is bound by every syllable he utters or proclaims, or knowingly impresses upon the vendee, as a lure or decisive motive for the bargain." See *Hough v. Richardson*, 3 Story, 659.

² *Leyland v. Illingworth*, 2 De G. F. & J., 253.

³ *Reynell v. Sprye*, 1 De G. M. & G., 708; *Jennings v. Broughton*, 5 Ib., 126; *Clarke v. Dickson*, 6 C. B. N. S., 453; *Smith v. Kay*, 7 House of Lds., 750, 775.

⁴ *Indianapolis, etc., R.R. Co. v. Tyng*, 63 N. Y., 653; S. C. 2 Hun., 311.

resentation was known to the party making it or not, on the ground that he who makes a representation as true, without knowing whether it is true or false, is guilty of gross negligence and recklessness, for which he is responsible, if he thereby misleads the other party.¹ For it is a wrong for a person to assert as true what he does not know to be true, even though he does not know it to be false, but believes, on insufficient grounds, that the statement will ultimately turn out to be correct.² It has accordingly been held that if a mortgage be obtained by misrepresentation, although the mortgagee does not know that the statement is false, yet if he undertake to state that it is true without a knowledge of its truth or falsity, and it deceives the party to whom it is made, and induces him to give the mortgage, it will avoid it.³ The gist of the inquiry is, not whether the party making the statement knew it to be false, but whether the assertion uttered as true was believed by the party to whom it was made to be true, and, if false, deceived him to his injury. The consequences of an innocent misrepresentation, if there can be such a thing, must fall on him who was the author of it, on the principle that the acts of even an innocent man shall prejudice him, rather than a stranger equally innocent.⁴ Where a pur-

¹ *Pulsford v. Richards*, 17 Beav., 87; *Hunt v. Moore*, 2 Pa. St., 105; *Reese v. Wyman*, 9 Ga., 439; *Smith v. Richards*, 13 Pet., 26; *Hough v. Richardson*, 3 Story, 659; *Taymen v. Mitchell*, 1 Md. Ch., 496; *Lewis v. McLemore*, 10 Yerg., 206; *York v. Gregg*, 9 Texas, 85; *Turnbull v. Gadsden*, 2 Strobb. Eq., 14; *Thompson v. Lee*, 31 Ala., 292; *Oswald v. McGehee*, 28 Miss., 340; *Bennett v. Judson*, 21 N. Y., 238; *Frenzel v. Miller*, 37 Ind., 1; *Elder v. Allison*, 45 Ga., 13; *Phillips v. Hollister*, 2 Coldw., 269; *Beebe v. Young*, 14 Mich., 136; *Gunby v. Sluter*, 44 Md., 237. But see *post*, § 307.

² *Kerr on Fraud and Mistake*, 54, 55; *Harding v. Randall*, 15 Me., 332; *Burford v. Caldwell*, 3 Mo., 477; *Hazard v. Irwin*, 18 Pick., 95; *Stone v. Denny*, 4 Metc., 151; *Smout v. Ilbery*, 10 M. & W., 10.

³ *Joice v. Taylor*, 6 Gill & Johns, 54.

⁴ *Tyson v. Passmore*, 2 Pa. St., 122, per Gibson, Ch. J. Where the purchaser has no knowledge of the fraud until several years after the transaction, lapse of time is not a bar to the suit. *Doggett v. Emerson*, 3 Story, 700. A fraud may be perpetrated as well by the assertion of facts that do not exist, ignorantly made by one whom the person acting upon the assertion has the right to suppose has used reasonable diligence to inform himself, as by concealing facts known to exist, which, in equity and good conscience, ought to be made known. *Graves v.*

chaser at an execution sale was induced to buy upon the representation of the judgment debtor that certain land was included in the levy, which in fact was not, it was held that the land passed in equity by the sale, and that a conveyance would be decreed whether the misrepresentation proceeded from design or a misapprehension of the facts.¹ The rule that where a party to a contract in making a false representation is honestly mistaken, there is no ingredient of fraud in the case, does not permit one to make false statements recklessly, or without some grounds for belief in them. Before a person positively affirms the existence of a fact, he must proceed upon reasonable inquiry, and have apparently some good reason for his affirmation. In equity the right to relief is derived from the suppression or misrepresentation of a material fact, though there be no intent to defraud. This doctrine is, however, substantially grounded in fraud, since the misrepresentation operates as a surprise and imposition upon the other party to the contract; and it is inequitable for a person to insist on enjoying the benefit of an agreement obtained by him through a misrepresentation, however innocently made.²

§ 306. *Deception by agent.*—If an agent effects a sale of land by means of false representations or other fraud, although without authority from his principal, and although the principal was ignorant that he had done so, the legal accountability of the principal is the same it would have been had he made the false representations or committed the fraudulent acts in person.³ For it is contrary to natural

Lebanon Nat. Bank, 10 Bush, Ky., 23. A misrepresentation of the law by a brother-in-law to his sister, by which she is led to believe her title to property held by her is invalid, and for this reason she sells it to him, which sale is much to his advantage, vitiates the sale at her election, even though such misrepresentation was made in good faith. *Sims v. Ferrill*, 45 Ga., 585.

¹ *Buchanan v. Moore*, 10 Serg. & Rawle, 304.

² *Smith v. Reese River Co.*, L. R. 2, Eq. 264; *Marsh v. Falker*, 40 N. Y., 566; *Wakeman v. Dalley*, 51 Ib., 27; *Hawkins v. Palmer*, 57 Ib., 664; *Hammond v. Pennock*, Ib., 145; *Story's Eq. Juris.*, Sec. 193; *Perry on Trusts*, Sec. 171.

³ *New Brunswick, etc., R.R. Co. v. Conybeare*, 9 House of Lds., 714, 726; *Barwick v. English Joint Stock Bank*, L. R. 2, Exch. 265; *Udell v. Atherton*, 7 H. & N., 184; *National Exch. Co. v. Drew*, 2 MacQ., 103; *Bartlett v. Salmon*,

justice to permit a person to retain an advantage acquired by the false representations of his agent, although he was not a party to them. So, if the owner of the land knew, when he made the sale, that the vendee was induced to buy by the false representations of a third person, and did not inform the vendee that the representations were false, he is in like manner responsible for the fraud, though such third person was not his agent. But if the third person was not the agent of the vendor in negotiating the sale, and the vendor made no false representations in respect to the property, and did not know that the third person had done so, he may assert his rights under the contract of sale after parting with a valuable consideration, to wit, a conveyance of the property, although subsequent thereto he was informed of the false representations.¹ Partners are bound by the false and fraudulent representations of one of them while acting within the scope of his authority, made with reference to the business of the firm.² The rule is the same as to the responsibility of corporations for the acts of their agents within the scope of their authority.³ Although an agent be not acting within the scope of his authority, if the principal suffers a person to expend money under the belief that the representations of the agent are authorized by the principal, a court of equity will not afterward permit the principal to set up want of authority of the agent.⁴

§ 307. *Where party making representation had reason to suppose it to be true.*—In an action at law for deceit, or in defence to an action at law on a contract, and in a suit

6 DeG. M. & G., 39; *Wheelton v. Hardisty*, 8 E. & B., 270; *Bristow v. Whitmore*, 9 House of Lds., 418; *Fitzsimmons v. Joslin*, 21 Vt., 129; *Crump v. U. S. Mining Co.*, 7 Gratt., 352; *Henderson v. R.R. Co.*, 17 Texas, 560; *Hough v. Richardson*, 3 Story, 689; *Cornfoot v. Fowke*, 6 M. & W., 358, *contra*.

¹ *Law v. Grant*, 27 Wis., 548; *Lindsey v. Veasy*, 62 Ala., 421.

² *Wickham v. Wickham*, 2 K. & J., 478; *Lovell v. Hicks*, 2 Y. & C. Ex., 46, 481; *Rapp v. Latham*, 2 B. & Ald., 795; *Blair v. Bromley*, 5 Hare, 557.

³ *Burnes v. Pennell*, 2 House of Lds., 497; *Ranger v. Gt. Western R.R. Co.*, 5 Ib., 86; *National Exch. Co. v. Drew*, 2 MacQ., 125; *Custar v. Titusville Water & Gas Co.*, 63 Pa. St., 381. But see *Brockwell's Case*, 4 Drew, 205.

⁴ *Kerr on Fraud and Mistake*, 117, referring to *Ramsden v. Dyson*, L. R. 1, Ch. 129, per Lord Cranworth.

in equity for the rescission of the contract, although the statement is false, there will be no such fraud as will induce the court to interfere, if the person making it honestly believed, upon reasonable grounds, that his assertion was true; unless there is a duty cast on him to know the truth, or the subject matter of the contract is so different from what it was represented to be, as to constitute a failure of consideration.¹ But if he afterward ascertain that the statement was untrue, he must correct the error, or it will become, in the contemplation of a court of equity, a fraudulent misrepresentation.²

§ 308. *False statement made ignorantly.*—It is a defence to a suit for specific performance, that the plaintiff was guilty of a misrepresentation of a material fact, although innocently made; for a person who seeks the enforcement of his contract, ought not only not to know that his statements with reference to the subject matter of it are false, but he ought to know that they are true.³ It was accordingly held that specific performance would not be decreed of a contract for the sale of land, where the sole inducement of the vendee to purchase was the representation of the vendor that there was abundance of iron ore on the land, when, in fact, the mine was not worth working, although the vendor did not know that the mine was worthless at the time of the sale, and the vendee agreed to take the risk of the value of the mine.⁴ It should be borne in

¹ Early v. Garret, 9 B. & C., 928; Freeman v. Baker, 5 B. & Ad., 797; Moens v. Heyworth, 10 M. & W., 147; Haycraft v. Creasy, 2 East., 92; Collins v. Evans, 5 Q. B., 820; Thom v. Bigland, 8 Exch., 726; Ormrod v. Huth, 14 M. & W., 651; Bartlett v. Salmon, 6 De G. M. & G., 33; Burrowes v. Lock, 10 Ves., 470; Brooks v. Hamilton, 15 Minn., 26; Meyer v. Amidon, 45 N. Y., 169; Oberlander v. Spiess, Ib., 175; Stitt v. Little, 63 Ib., 427.

² Reynell v. Sprye, 1 De G. M. & G., 660. And see Traill v. Baring, 33 L. J. Ch., 521.

³ Ainslie v. Medlycott, 9 Ves., 13, 21; Wall v. Stubbs, 1 Mad., 80; Stewart v. Alliston, 1 Mer., 26; Higgins v. Samels, 2 J. & H., 460; Price v. Macaulay, 2 De G. M. & G., 339; Hume v. Pocock, L. R. 1, Ch. 379; Laight v. Pell, 1 Edw. Ch., 577; Swimm v. Bush, 23 Mich., 99; Holme's Appeal, 77 Pa. St., 50. See Denny v. Hancock, L. R. 6, Ch. 1; Upperton v. Nickolson, Ib., 436; 10 Ib., 228; Powell v. Elliott, 10 Ib., 424; Harnett v. Baker, L. R. 20, Eq. 50.

⁴ Fisher v. Worrall, 5 Watts & Serg., 478.

mind that specific performance is in the discretion of the court in view of all the circumstances of the case, and that it does not follow that because a contract is good at law it will therefore be enforced in equity, or that a court of equity will decree the specific performance of every contract which it will not set aside. Equity will often refuse to interfere where the contract is perfectly valid and binding at law, and leave the parties to their legal rights.¹ A court of equity will not specifically enforce a contract unless satisfied as to the fairness and good faith of the party seeking its assistance.² The effect of the misrepresentation of a portion of the subject of the contract, is not to modify the contract *pro tanto*, but to destroy it wholly so far as the right of the party making the misstatement to enforce it is concerned.³ Although the misrepresentation was made by the plaintiff in consequence of information which was equally accessible to the other party, yet if the error could not easily have been discovered by the latter, it will constitute a defence to a suit for specific performance.⁴ But a contract of sale may be specifically enforced notwithstanding an erroneous description of the property, if the vendee, at the time of the purchase, was aware of the fact, or viewed the property previous to buying, or the circumstances were such that it was the duty of the vendee to examine for himself.⁵ So, where a misrepresentation has

¹ Radcliffe v. Warrington, 12 Ves., 331; Watson v. Marston, 4 De G. M. & G., 230; Falcke v. Gray, 4 Drew, 659; Vigers v. Pike, 8 Cl. & Fin., 645; Rawlins v. Wickham, 3 De G. & J., 322; Wilde v. Gibson, 1 House of Lds., 607; Myers v. Watson, 1 Sim. N. S., 529; Pratt v. Carroll, 8 Cranch, 471; King v. Hamilton, 4 Pet., 311; Clitherall v. Ogilvie, 1 Dessaus Eq., 256; Eastland v. Vanarsdale, 3 Bibb., 274; Perkins v. Wright, 3 Har. & McHen., 324; Reinicker v. Smith, 2 Har. & Johns, 421; Rice v. Rawlings, Meigs, 496; Leigh v. Crump, 1 Ired Eq., 299.

² Walters v. Morgan, 3 De G. F. & J., 718; Cox v. Middleton, 2 Drew, 220; Brealey v. Collins, You., 327.

³ Viscount Clermont v. Tasburgh, 1 J. & W., 119, 120; Rawlins v. Wickham, 3 De G. & J., 321.

⁴ Harris v. Kemble, 7 L. J. Ch., 85; 5 Bligh, N. S., 730.

⁵ Dyer v. Hargrave, 10 Ves., 505; Lord Brooke v. Roundthwaite, 5 Hare, 306; Haywood v. Cope, 25 Beav., 140; Henderson v. Hudson, 15 W. R., 860; Kerr on Fraud and Mistake, 359.

been made unintentionally, and the subject of the contract substantially answers the description, specific performance will be decreed with compensation for the variation;¹ or the contract will be enforced upon the terms of the plaintiff making good his representation, if that can be done.²

§ 309. *False statement must relate to contract.*—The misrepresentation must have been made with reference to the transaction in question, and for the purpose of inducing the party to whom it is made, to enter into it; and not relative to some collateral matter, or other dealing, between the parties.³ It must in general have been made at the time of the negotiation.⁴ If made some time previous to the transaction, it will not be sufficient, unless proved to have been immediately connected with it.⁵ A joint stock company in embarrassed circumstances had published exaggerated reports of its condition; and soon after the last of these reports, in order to prevent the fall of its stock in the market, and to counteract unfavorable rumors, the company, through its manager, urged the defendants to buy

¹ Howland v. Norris, 1 Cox, 61; Magennis v. Fallon, 2 Moll., 588.

² Howland v. Norris, *supra*; Hill v. Buckley, 17 Ves., 395; Pulsford v. Richards, 17 Beav., 87, 96.

³ Harris v. Kemble, 1 Sim., 122, overruled, but not as to the principle, S. C., 5 Bligh N. S., 730; Attwood v. Small, 6 Cl. & Fin., 232, 445; Jameson v. Stein, 21 Beav., 5; Denne v. Light, 8 De G. M. & G., 774; Queen v. Sadler's Co., 10 House of Lds., 404. The vendor of a house and lot, worth about fourteen thousand dollars, agreed in writing to take eight hundred dollars of the purchase money in stock of certain machine works at par, relying on the representation of the vendee that the stock was worth par, when, in fact, it was worth only ten cents on the dollar, which was not then known to the public, or to the directors. In the absence of fraudulent intent on the part of the vendee, it was held that he was entitled to specific performance. Powers v. Mayo, 97 Mass., 180. A married woman, after having executed a mortgage in apparent conformity with all the requirements of the law, will not be entitled to have the same set aside on the sole testimony of her and her son, a boy between ten and eleven years of age, as to the alleged misrepresentations made to her by her husband and the notary relative to the contents of the deed, to which representations the mortgagee was in no wise privy. Spurgin v. Trant, 65 Ill., 170. "Even were the proof of such misrepresentations undoubted, and were there no evidence of lack of diligence in obtaining knowledge of the contents of the mortgage, we should have hesitated long before relieving against and annulling it in such a case." *Ib.*, per Sheldon, J.

⁴ Harris v. Kemble, *supra*.

⁵ Smith v. Kay, 7 House of Lds., 750; Hotsom v. Browne, 9 C. B. N. S., 445; Wheelton v. Hardisty, 26 L. J. Q. B., 265.

additional stock, stating that the company would advance the necessary funds, and that the stock would be held until it could be sold at a profit, without the defendants being called on to pay anything. The stock having become worthless, the company sued for the money advanced, to which the defendants pleaded the fraud of the company. To this plea it was objected, among other things, that the loan and the purchase were independent transactions, and that the alleged misrepresentations in the purchase did not vitiate the loan. The defence was, however, sustained; Lord Cranworth holding that the transaction did not constitute a loan, in the ordinary sense, but a special contract of the company to purchase for the defendants, to be repaid only in a particular manner; and Lord St. Leonards putting it on the ground that the purchase and loan were a single transaction, though consisting of two parts, since if there had been no loan, there would have been no purchase, and if there had been no purchase, there would have been no loan.¹

§ 310. *Need not have been a wrongful intent.*—For a false statement to operate as a misrepresentation, it is not necessary that it should have been made from a corrupt motive of gain, or with the intent to injure the person to whom it is made. If a person states what he knows to be false, or what he has no reasonable ground to believe to be true, in order to influence the course of another, who acts upon the statement to his injury, the law imputes to him a fraudulent intent, although he may not have been in fact governed by a wrongful design. A fraudulent intent, in the eye of the law, does not necessarily depend upon dishonesty of purpose in making the representation.² Thus, where a person without authority accepted a bill as the

¹ National Exchange Co. v. Drew, 2 M'Q., 103.

² Foster v. Charles, 7 Bing., 107; Murray v. Mann, 2 Exch., 541; Gibson v. D'Este, 2 Y. & C. C. C., 542; Wilde v. Gibson, 1 House of Lds., 605; Elliott v. Boaz, 9 Ala., 772; Page v. Bent, 2 Metc., 371; Collins v. Dennison, 12 Ib., 549; ante, § 293.

pretended agent of the drawee in his absence, believing that the drawee would have accepted it, and without any fraud in fact, he was held liable as for a fraud in law ; since he had been guilty of misrepresentation knowing it to be such, in a manner calculated to cause another to act on the faith of it to his injury, and the damage had actually occurred.¹

§ 311. *False statement must have been relied on.*—A misrepresentation, to be a ground for relief in equity, must not only have been in relation to a material fact constituting the basis of the agreement, but the party to whom the misrepresentation was made, must have entered into the contract on the faith and credit of it.² At least he must have so far relied on the statement as that it is reasonable to suppose that he would not have made the agreement if the representation had not been made, or not on the same terms.³ Lord Brougham, in a suit to set aside a contract, stated the rule, as derived from the earlier decisions, thus : “What inference do I draw from these cases? It is this, that general fraudulent conduct signifies nothing ; that general dishonesty of purpose signifies nothing ; that attempts to overreach go for nothing ; unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but the very

¹ Polhill v. Walter, 3 B. & Ad., 114.

² The injured party must not only have relied upon the representation, but he must have had a right to rely on it. Graffenstein v. Epstein, 23 Kansas, 443. If he enter into new stipulations, he thereby waives the misrepresentation. Thweatt v. McLeod, 56 Ala., 375.

³ Merewether v. Shaw, 2 Cox, 134 ; Jennings v. Broughton, 5 De G. M. & G., 126, affirming S. C., 17 Beav., 234 ; Denne v. Light, 8 De G. M. & G., 774 ; Juzan v. Toulmin, 9 Ala., 662 ; Taylor v. Fleet, 1 Barb., 471 ; Phipps v. Buckman, 30 Pa. St., 401. Parol evidence is admissible to show what passed between the parties at and immediately before the execution of a writing, where what was said by one induced the other to execute the agreement. Campbell v. McClenahan, 6 Serg. & Rawle, 171. It is sufficient evidence of fraud, that assertions as to the value of an invention, were connected with a false representation of an extrinsic fact calculated to impose upon the plaintiff, to put him off his guard, and to induce him to give credit to the statement of value. Miller v. Barber, 66 N. Y., 558.

ground upon which this transaction took place, and have given rise to the contract.”¹ Fraudulent representations as to the legal operation and effect of an instrument will avoid it, although made to a person who can read, or who has read the instrument, if he is unable to judge as to its true character and construction. But to have that effect, the fraud must be contemporaneous with the execution of the instrument, and consist in obtaining the assent of the party defrauded to it by inducing a false impression of its nature and operation.² For a representation to be of avail to the party alleging it, two things are requisite: It must not only have been false and material, but have been an inducement to the transaction;³ for the former may exist in a given case without the latter.⁴ A misrepresentation to be material must have been the proximate and necessary, and not the remote or indirect, cause of it.⁵ Representations calculated simply to arouse the sympathy of the plaintiff, and induce him, from charitable motives, to do voluntarily what he knows he is under no legal obligation to do, however reprehensible, do not furnish any basis for equitable relief.⁶

§ 312. *Party complaining of false statement must not have been in fault.*—To justify relief in equity against a contract of sale, the representation of the vendor must have been in relation to some material thing unknown to the purchaser, which absence of knowledge must not have arisen from mere negligence, but from want of being informed, or from an entire confidence reposed in the vendor; and then, a remedy must be sought within a reasonable time after the

¹ Attwood v. Small, 6 Cl. & Fin., 447.

² Berry v. Whitney, 40 Mich., 65, referring to White & Tudor's Cases, Vol. 2, Pt. 1, 559-567, and cases cited.

³ Hough v. Richardson, 3 Story, 690; Ely v. Stewart, 2 Md., 408; Gunby v. Sluter, 44 Ib., 237.

⁴ Boyce v. Watson, 20 Ga., 517; Clark v. Everhart, 63 Pa. St., 347; McDonald v. Trafton, 15 Me., 225.

⁵ Barry v. Croskey, 2 J. & H., 1; Barnes v. Pennell, 2 House of Lds., 497, 531; New Brunswick, etc., R.R. Co. v. Conybeare, 9 Ib., 711; Shaw v. Stines, 8 Bosw., 157.

⁶ Noel v. Horton, 50 Iowa, 687.

injury is discovered. As where the vendor prevents the vendee from examining the records in relation to the title by assurances that the title is perfectly good, and the property free from incumbrances, and upon the faith of such assurances and representations the vendee abstains from making the proper examination. But the court will not act without the clearest proof of the fraudulent representations, and that they were made under such circumstances as to show that the contract was founded on them.¹ The principle is applicable to the quality and identity of property, as well as to incumbrances on it.²

§ 313. *In cases of trust and confidence.*—Where there is a peculiar relation of a confidential and fiduciary character, to prevent the undue advantage which the situation of one of the parties gives him over the other, the law requires the utmost degree of good faith in all transactions between them. If in such case there is any misrepresentation or concealment of any material fact, or any just suspicion of artifice or undue influence, the court will interpose and pronounce the transaction void, and, as far as possible, restore the parties to their original rights.³ “Courts of equity watch with extreme jealousy, all contracts made by persons when there is ground to suspect imposition, oppression, or undue advantage taken by one of the parties; or when one trusts another with a blind and credulous confidence; or when one of the parties, from whom an advantage has been obtained, was in circumstances of extreme necessity and distress.”⁴ Where a sale and conveyance of real estate was obtained by undue influence exercised over the mind of a weak and illiterate man, producing confusion and terror, by means of misrepresentations as to his personal danger, it was held, on demurrer, a ground for equitable relief.⁵ A case of this kind is more nearly allied to duress, than to

¹ *Holland v. Anderson*, 38 Mo., 55; 1 Story's Eq. Juris., Sec. 200.

² *Hall v. Thompson*, 1 Sm. & Marsh, 443.

³ *Miller v. Miller*, 68 Pa. St., 486. See *Christian v. Ransome*, 46 Ga., 138.

Willard's Eq. Juris., 176.

⁵ *Kuelkamp v. Hidding*, 31 Wis., 503.

fraud ; or perhaps it may be said to comprise both. In a suit against an aged man and his wife for the specific performance of a contract to sell to the complainant a farm for eleven thousand dollars, one thousand dollars of which was to be paid on a specified day, when the land was to be conveyed, and a mortgage given back for the payment of the balance in ten years thereafter with interest, it appeared that it was further agreed that if the purchaser should, at any time, desire to convey the property, the vendors would cancel the mortgage on payment by the purchaser to them of such portion of the mortgage as the land so to be conveyed bore to the whole farm. The vendee did not stipulate to buy the land, or to pay the purchase money, or bind himself by any personal obligation to carry out the agreement on his part. The vendors claimed that it was verbally agreed that there should be reserved from the sale, one acre, including their dwelling-house and other buildings ; that the contract was drawn by the vendee, who, upon being asked if the reservation had been specified in the written contract, answered that that was unnecessary, as it would be inserted in the deed, and that the contract was all right ; that the vendors having confidence in the vendee, who represented that he was something of a lawyer, and relying on his statement, signed the contract ; that when the first payment was made, they tendered a deed to the vendee containing the reservation, which he declined to accept. At the trial, the vendee offered to waive the unjust provisions made for his benefit, and to bind himself personally for the payment of the purchase money, provided the court found that the contract was as claimed by him, and that it embraced the acre where the buildings stood. The court, in dismissing the bill, said : “ Not being satisfied that any such contract was ever agreed upon between the parties as is set up in the bill, and without passing upon the question of actual fraud, we cannot decree specific performance of the contract, notwithstanding the proposed concessions of the

complainant."¹ A step-father having induced his step-sons, who in their minority were accustomed to obey him, and were ignorant of business affairs, to make a contract, unconscionable in character, to convey to him their real estate, it was held that the contract could not be enforced.² So, where a person bought land of a young man, who was ignorant of its value, the purchaser knowing what it was worth, and importuning him to sell, the court refused specific performance.³ And the same was done where a son procured from his old and feeble father an agreement for the sale to him of a farm, using undue influence to procure it.⁴ An infant having entered into a written agreement for the sale of his land, the purchaser brought a suit for specific performance, alleging that the infant, in conjunction with his father, fraudulently represented that he was of age. As it appeared that the purchaser knew that there was great doubt as to the vendor's age, and that the bargain was a disadvantageous one on the part of the infant, who was influenced by his father, and that the father conducted the negotiation and received the purchase money, the bill was dismissed.⁵ Mere weakness of intellect, if the party is *compos mentis*, does not deprive him of the capacity to contract. But imbecility of understanding, constitutes a material ingredient in examining whether a bond, or other contract, has been obtained by fraud, imposition, or undue influence. For, although a contract made by a man of fair understanding, may not be set aside because it was a rash, improvident, or hard bargain, yet if made with a person of imbecile mind, the inference naturally arises that it was obtained by circumvention, or undue influence.⁶ Where a party making a

¹ Chambers v. Livermore, 15 Mich., 381.

² Tucke v. Bucholz, 43 Iowa, 415.

³ Clitherall v. Ogilvie, 1 Dessaus Eq., 250.

⁴ Brady's Appeal, 66 Pa. St., 277.

⁵ Dibble v. Jones, 5 Jones Eq., 389.

⁶ Reinicker v. Smith, 2 Har. & Johns, 324. In regard to acts done and contracts made by parties affecting their rights and interests, the general theory of the law is, that in all such cases there must be full and free consent, in order to make the agreement binding on them. Hence it is said, that if consent be obtained by meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind. For

purchase is intoxicated at the time of the sale, such intoxication is not sufficient cause to refuse to decree specific performance of the contract against him, unless it appear that the vendor produced or procured his intoxication, or that undue advantage was taken of it.¹ If one of the parties is a guardian or trustee, the plaintiff must show that the contract sought to be enforced, was such as the guardian, acting for the best interests of the infant, might properly have made, and such as the court would have authorized and approved, had authority to make it been asked.²

§ 314. *Conjecture, opinion, or judgment.* — In considering whether the defendant relied on the statements of the plaintiff, it is important to distinguish between such representations as belong to the bargain, whether made a part of the legal agreement or not, and the mere holding out of vague hopes and anticipations which ought to put the party on inquiry. To this end, an important question will be, whether what was undertaken or stated, was in the power or knowledge of the party making the representa-

although the law will not inquire generally into men's acts and contracts, to determine whether they are wise and prudent, yet it will not suffer them to be entrapped by the fraudulent contrivances, or cunning, or deceitful management of those who purposely mislead them.

¹ Maxwell v. Pittinger, 3 N. J. Eq., (2 Green), 156; Rodman v. Zilley, 1 Ib. (Saxton, 320; Whitesides v. Greenlee, 2 Dev. Eq., 152; Hanna v. Phillips, 1 Grant Pa. Cas., 253. Of course, a contract entered into by a person who is in such a state of intoxication as to be deprived of his reason, is incapable of being enforced against him. Crane v. Conklin, Saxton, 346; Morrison v. McLeod, 2 Dev. & Batt. Ch., 221; Cruise v. Christopher, 5 Dana, 181; Phillips v. Moore, 11 Mo., 600; Prentice v. Achorn, 2 Paige Ch., 30; Galloway v. Witherspoon, 5 Ired. Eq., 128. See *ante*, Book III., Ch. 1.

² Sherman v. Wright, 49 N. Y., 227. In equity, dealings between a guardian and his ward are closely scrutinized, and unless it appear that they were undertaken by the ward freely, and with knowledge of their nature, character, and probable consequences, they will be invalid. Archer v. Hudson, 15 L. J. Ch., 211; Mulhallen v. Marum, 3 D. & W., 317; Waller v. Armistead, 2 Leigh, 11; Gallatin v. Erwin, 1 Hopkins Ch., 48; Love v. Lea, 2 Ired. Eq., 627; Lee v. Fox, 6 Dana, 171; Scott v. Freeland, 7 Sm. & Marsh, 409; Meek v. Perry, 36 Miss., 190; Walker v. Walker, 101 Mass., 169. But in a suit by the trustees of a married woman for the specific performance of an agreement to sell the unexpired remainder of an under-lease of a house, interrogatories filed by the defendant to show that the proposed investment of the trust funds in the purchase was a breach of trust, were ordered to be stricken out as irrelevant; the simple question in the suit being whether there was a binding agreement. Mansfield v. Childerhouse, L. R. 4, Ch. D. 82.

tion. Thus, in a sale of mining property, there is a wide difference between a specific assertion as to its capabilities, and a general statement relative to its prospects, which, from the nature of such property, must be in a great measure problematical.¹ Where a vendor told the vendee that he had heard his brother say that the plot called for one hundred and seventy-three acres, but that he did not himself know how much it contained, never having seen it surveyed, it was held that such representation could not be considered as making it inequitable to compel performance by the vendee, though, upon measurement, the farm was found to contain only one hundred and forty-five acres.² The ordinary banter and abating of prices will not be entitled to much weight. The decision must rest upon the presence or absence of such a state of facts, as, under all the circumstances, renders the bargain unconscionable.³

¹ *Jennings v. Broughton*, 17 Beav., 234. A matter of opinion may, however, amount to an affirmation, and be the inducement to a contract. *Grim v. Byrd*, 32 Gratt., 293. It has been held that a verbal promise by one of the parties at the time of making a written contract, when used to obtain the execution of the writing, may be given in evidence, on the ground that the attempt afterward to take advantage of the omission from the contract of such promise, is a fraud upon the party who was induced to execute it upon such promise. *Powelton Coal Co. v. McShane*, 75 Pa. St., 238; *Graver v. Scott*, 80 Ib., 88. By a marriage settlement, real estate was limited to such uses as A. and B., a husband and wife, should appoint, and, in default of appointment, to the use of trustees during the life of B., in trust for her separate use, with remainder to A. in fee. A. contracted to sell the land to C., who had knowledge of the settlement; and A. stipulated that he would "procure a proper assurance of the premises to the purchaser, to be executed by all necessary parties." C. paid the purchase money to the trustees of the settlement, who invested it pursuant to the contract; and a draft conveyance in the form of a joint appointment by A. and B. to C. was approved, but before it was executed, A. died, and B. thereupon refused to convey her life interest. It was held that C. was entitled to a performance of the contract to the extent of A.'s remainder in fee, with compensation in respect to B.'s life interest, and a lien on the purchase money in the hands of the trustees of the settlement. *Baker v. Cox*, L. R. 4, Ch. D. 464. The foregoing decision was made on the ground that A. represented that he had the means of conveying the entire interest, and that C. had good reason under the circumstances to suppose that the husband and wife would join in a conveyance by way of appointment, which under the settlement they had a right to do, and that having parted with his money, he was entitled to be placed by compensation in the position he would have been in if the contract had been completed. In *Castle v. Wilkinson*, L. R. 5, Ch. 53, in which it was held that the purchaser could not compel the husband to convey his interest and accept an abated price, the purchaser was not misled, but knew that the property belonged to the wife.

² *Stull v. Hurtt*, 9 Gill, 446; *Stebbins v. Eddy*, 4 Mason, 414. But see *Pringle v. Samuel*, 1 Litt., 43.

³ *Swimm v. Bush*, 23 Mich., 99.

Boastful or exaggerated statements are different from the assertion of a definite fact.¹ Loose, conjectural, and overdrawn representations, as to the prospects of a company, or as to the value of securities, or the situation of property, are essentially uncertain in their nature, and but the expression of opinion or judgment, as to which honest men may differ. Although such affirmations may be erroneous or false, they will not usually be regarded as evidence of fraudulent intent.² A representation that land was uncommonly rich water-meadow, when in fact it was very imperfectly watered, was held not to be a bar to performance.³ Where the principal ground on which the purchaser relied to set aside the sale, was, that the vendor untruly and fraudulently represented, during their negotiations, that the land in question "was full as early, if not earlier, than any other land on the west end of Long Island, and was as well adapted to the raising of early vegetables, fruits, and market produce, as any other land on the end of the Island, a decree in favor of the complainant in the court below, was reversed with costs.⁴ An assertion of value may, however,

¹ *Ross v. Estates Investment Co.*, L. R. 3, Eq. 136; *Ingram v. Thorp*, 7 Hare, 74; *Hume v. Pocock*, L. R. 1, Ch. 385.

² *Dimmock v. Hallett*, L. R. 1, Ch. 26; *Evans v. Bolling*, 5 Ala., 550; *Halls v. Thompson*, 1 Sm. & Marsh, 443; *Anderson v. Hall*, 2 Ib., 679; *Medbury v. Watson*, 6 Metc., 259; *Gordon v. Parmelee*, 2 Allen, 214; *Manning v. Albee*, 11 Ib., 522; *Drake v. Latham*, 50 Ill., 270; *Bridges v. Robinson*, 2 Tenn. Ch., 720. "Mere general assertions of a vendor of property, as to its value, or the price he has been offered for it, or in relation to its qualities and characteristics;—as for instance, that land is fertile and improvable, or that the soil is adapted to a particular mode of culture, or is well watered, or is capable of producing crops, or supporting cattle, or that a house is a desirable residence, etc., are assumed to be so commonly made by persons having property for sale, that a purchaser cannot safely place confidence in them. Affirmations of the sort are always understood as affording to a purchaser no ground for neglecting to examine for himself, and ascertain the real condition of the property. They are, strictly speaking, *gratis dicta*. A man who relies on such affirmations, made by a person whose interest might so readily prompt him to invest the property with exaggerated value, does so at his peril, and must take the consequences of his own imprudence." *Kerr on Fraud and Mistake*, 83, 84.

³ *Scott v. Hanson*, 1 Sim., 13; 1 Ry. & M., 128.

⁴ *Taylor v. Fleet*, 4 Barb., 95, reversing S. C., 1 Ib., 471. In the foregoing case, it appeared that A. bought a farm of B., for the purpose of engaging in the business of raising early vegetables for the New York market, B. being at the time apprised of his object. The farm was not in fact as well adapted to

be so extravagant, that the party making it could not possibly have believed it himself.¹ The same may be the case as to statements respecting the quality or condition of land;² and so of other statements.³ It has been held that a purchaser is not justified in relying on the assertion of the vendor that a third person offered a given sum for the property.⁴ But, in general, it is the duty of the vendor, if he make statements relative to the property, to do so according to the facts, and in language free from ambiguity.⁵ Specific performance was decreed of a contract to purchase colliery works, with compensation to the purchasers in respect to misrepresentations of the vendor as to the amount of stores consumed in the colliery, and a consequent excess in the statement of income, and the purchasers were held entitled to a deduction from the purchase money bearing the same proportion to the whole amount, as the excess bore to the income stated.⁶

§ 315. *Presumption that false statement produced no effect.*—Some of the reasons for presuming that a representation was not relied on by the party to whom it was made, were stated by Lord Langdale⁷ thus: "If the party to

the purpose in view, as other lands in the neighborhood, crops in the latter being a week or ten days earlier. A. was uninformed as to the character and capabilities of the farm, and had no means of obtaining such information excepting from those who had derived it from their own observation and experience. B., knowing that his farm was not as early as other lands in the vicinity, represented to A., when asked by him in relation to the quality and capability of the soil, that "there was no earlier land anywhere about there." And A. made the purchase relying on the truth of this representation. In the court below, it was held that the sale must be set aside, and the parties be restored to their original rights; that there must be a decree directing the repayment of the purchase money received by B., with interest, upon the execution of a reconveyance by A.; that A. was entitled to be paid for the increased value of the farm by reason of permanent improvements made since the purchase, and must be charged with the fair annual value of the farm by reason of permanent improvements made since the sale; and, that a bond and mortgage executed to secure the balance of the purchase money, and for the foreclosure of which a cross bill had been filed, must be cancelled.

¹ Wall v. Stubbs, 1 Mad., 80; Ingram v. Thorp, 7 Hare, 74.

² Dimmock v. Hallett, *supra*; Van Epps v. Harrison, 5 Hill, 67.

³ Henderson v. Lacon, 5 Eq., 257.

⁴ 1 Roll. Abr., 101, Pl. 16.

⁵ Martin v. Cotter, 3 Jon. & L., 496, 507; Wall v. Stubbs, *supra*.

⁶ Powell v. Elliott, L. R. 10, Ch. 424. ⁷ In Clapham v. Shillito, 7 Beav., 146.

whom the representations were made, himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party. Or, if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded. Again, when we are endeavoring to ascertain what reliance was placed on representations, we must consider them with reference to the subject matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made to him by him who was supposed to be better informed. But if the subject is in its nature uncertain, if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring information, and equal skill, it is not easy to presume that representations made by one would have much, or any, influence upon the other."

§ 316. *Where party to whom representation is made investigates it.*—If a person, to whom a statement is made, resorts to other means of knowledge open to him, and relies upon his own judgment in the matter, he cannot be heard to say that he relied upon the representation.¹ It was

¹ Pike v. Vigers, 2 D. & W., 261; Clarke v. Macintosh, 4 Giff., 134; Hough v. Richardson, 3 Story, 659; Vesey v. Doton, 3 Allen, 380.

said in an early case : " If the vendor gives in his particular of the rents, and the vendee says he will trust him and inquire no further, but rely upon his particular ; then, if the particular be false, an action will lie. But if the vendee will go and inquire further what the rents are, there it seems unreasonable he should have any action, though the particulars are false ; because he did not rely on the particular." ¹ In the celebrated case of *Small v. Attwood*,² which was a suit for the rescission of a contract, it appeared that the British iron company had sent a committee of its directors to the works of Attwood to verify his statements, who reported that they were satisfied with the proofs. It was held that the company had thereby precluded itself from setting up in defence any previous misrepresentations ; on the ground that " if a purchaser chooses to judge for himself, and does not avail himself of all the knowledge, and means of knowledge, open to him, he will not afterward be allowed to say that he was deceived by the representations of the vendor." ³ So, in a suit to set aside the sale of shares in a mine on the ground of misrepresentations as to the condition of the mine, it being shown that the plaintiff had inspected the mine and investigated its condition, the bill was dismissed, the alleged misrepresentation being such as he might have discovered.⁴ And where the vendee of land objected that he was misled by a representation that the woods sold had yielded two hundred and fifty pounds a year for an average of fifteen years, when, though they might in fact have done so, yet they would not have done it in a fair course of husbandry, and it was proved that he was given a paper from which he might have learned that the woods had been unequally cut, it was held that the objection could not prevail.⁵ But if the misrepresentation of a material fact is such as to prevent a full examination, and

¹ Lord Holt in *Lysney v. Selby*, 2 Ld. Rymn., 1118, 1120.

² 6 Cl. & Fin., 232.

³ Fry on Specif. Perform., 199.

⁴ *Jennings v. Broughton*, 17 Beav., 234, Affd. 5 De G. M. & G., 126.

⁵ *Lowndes v. Lane*, 2 Cox, 363.

to cause the statement to be in part confided in, to the injury of the person to whom it is made, it vitiates the entire contract.¹

§ 317. *Where party complaining of deception acted with full knowledge.*—A misrepresentation in a matter of opinion and fact, equally open to the inquiry of both parties, and in regard to which neither can be presumed to have trusted the other, unless it be a mere contrivance of fraud in cases of peculiar relationship or confidence, or where the other party has justly reposed upon it, and has been misled, furnishes no ground for the interference of equity. Where means of knowledge are at hand and available to both parties, and the subject of the contract is equally open to their inspection, if the party to whom the statement is made does not avail himself of those means and opportunities, he will not be heard to say, in impeachment of the contract, that he was drawn into it by misrepresentations.² It will therefore be a sufficient answer to an alleged misrepresentation, that the party setting it up was well aware of the real facts, and that he knew from the beginning all the matters complained of, or, after obtaining such knowledge, continued to act on the agreement, or to deal with the property embraced in it—as the lessee of a mine continuing to work it after knowledge of alleged misrepresentations;³ or where a person, after ascertaining that the statements in a

¹ *Mason v. Crosby*, 1 Woodb. & Minot, 342; *Smith v. Babcock*, 2 Ib., 246.

² *Slaughter v. Gerson*, 13 Wall, 383; *Tallman v. Green*, 3 Sandf., 437; *Smith v. Countryman*, 30 N. Y., 681; *Long v. Warren*, 68 Ib., 426; *Mooney v. Miller*, 102 Mass., 220. A. and B. agreed to exchange lands, A.'s land being estimated at twenty-two hundred dollars, for which B. was to convey land of equal value when A. had selected it and had furnished a plot of that chosen. Subsequently the time for choosing, valuing, and conveying B.'s land was extended, upon A.'s representations as to its value, and it was agreed that A. might take land from other tracts to the amount of twenty-two hundred dollars, to be valued by the agents of both parties. A. conveyed to B., and B.'s land was valued. A. having died, and B. having become bankrupt, the executors of A. demanded a conveyance from the assignees of B., which was refused, on the ground that the second contract had been obtained by the misrepresentations of A. On a bill to obtain a conveyance, it was held that it could not be presumed that B. acted solely upon the representations of A., and that the assignees of B. must convey. *M'Iver v. Kyger*, 3 Wheat., 35.

³ *Vigers v. Pike*, 8 Cl. & Fin., 562. See *McBryde v. Weekes*, 22 Beav., 533.

prospectus, on the faith of which he has bought shares, are false, deals with the shares as owner, by directing a broker to sell them;¹ or concurs in the appointment of a committee of investigation into the affairs of the company in behalf of the shareholders.² This principle applies where the thing respecting which the representations are made is capable of being seen by any one.³ If the defects in the subject matter of sale are such as are capable of being discovered by the exercise of ordinary vigilance, and the vendee is afforded an opportunity to view the property, the vendor is not required to assist the observation of the purchaser. Although a false statement has been made by the vendor relative to some patent defect in the property sold, yet if it be proved that the purchaser has seen the property, so that the defect must have been known to him, he cannot avail himself of the defect as a bar to specific performance. Where a farm was described as being bounded by a ring fence, which was not the case, and it was proved that the defendant had spent his life in the neighborhood, had viewed the farm before purchasing it, and must have known whether or not it lay within a ring fence, the alleged misrepresentation was held not a defence.⁴ The same principle applies to a warranty at law, in which defects apparent at the time of the bargain are not included, because they cannot be the subjects of deceit or fraud.⁵ But a misrepresentation of the vendor will not be excused, without conclusive proof of knowledge in the other party. He "must show very clearly that the purchaser knew that to be untrue which was represented to him as true; for no man can be heard to say that he is to be assumed not to

¹ Briggs *ex parte*, L. R. 1, Eq. 483. ² Lawrence's Case, L. R. 2, Ch. 424.

³ Grant v. Munt, Cooper, 173; Buck v. McCaughtry, 5 Monroe, 216; Reading v. Price, 3 J. J. Marsh, 61; Barnett v. Stanton, 2 Ala., 181; McKinney v. Fort, 10 Texas, 220; Barron v. Alexander, 27 Mo., 530; Caldwell v. McClelland, 3 Sneed, 150.

⁴ Dyer v. Hargrave, 10 Ves., 505.

⁵ Bayley v. Merrel, Cro. Jac., 386; Margetson v. Wright, 7 Bing., 603; Horsfall v. Thomas, 1 H. & C., 100.

have spoken the truth."¹ Where particulars described the subject of sale as a certain interest, if any, the vendor being aware at the time that it was valueless, which the purchaser had no means of knowing, the transaction was held fraudulent.² And where the vendor concealed the fact that the premises encroached on a common to which he had no title, the sale was set aside.³ If a sale be made of property situated abroad or at a distance, and the purchaser, never having seen it, is obliged to depend upon the statement of the vendor with respect to it, the vendor is bound to make good the representation.⁴ A purchaser, who is intimately acquainted with the property, may not have knowledge of its exact contents, and thus be deceived by a representation which conveys the idea of exact admeasurement.⁵ The fact that other means of knowledge were open to the purchaser will not be sufficient, although, independently of the representation, the party relying on it would in law have been taken to have had notice of the contrary; but it must be shown that information of the real facts was communicated to the purchaser; the doctrine of notice not being applicable where there has been a representation as to something, notice of which would otherwise be implied.⁶ So, where a positive representation has been made, it will not be avoided by a general statement, or circumstances from which an inference contrary to the representation might be drawn, although, if the representation had not been made, they might have been sufficient to put the other party on

¹ Knight, Bruce, L. J., in *Price v. Macaulay*, 2 De G. M. & G., 346; *Wilson v. Short*, 6 Hare, 366, 378; *Dyer v. Hargrave*, *supra*.

² *Mellish v. Motteux*, Peake, 115. And see *Smith v. Harrison*, 26 L. J. Ch., 412.

³ *Edwards v. M'Leay*, 2 Swanst., 287.

⁴ *Re Reese River Silver Mining Co.*, L. R. 2, Ch. 614; *Smith v. Richards*, 13 Pet., 26; *Camp v. Camp*, 2 Ala., 632; *Spalding v. Hedges*, 2 Pa. St., 240; *Babcock v. Case*, 61 Ib., 427; *Miner v. Medbury*, 6 Wis., 295.

⁵ *Hill v. Buckley*, 17 Ves., 394.

⁶ *Drysdale v. Mace*, 2 Sm. & Gif., 225, 230; *Price v. Macaulay*, *supra*. And see *Gibson v. D'Este*, 2 Y. & C. C. C., 542, 572. A misrepresentation as to title will not be cured by the fact that the deed is recorded. *Parham v. Randolph*, 4 How. (Miss.), 435.

inquiry ;¹ nor by the fact that the person making the representation advised the other party to consult his friends and professional advisers ; for “no man can complain that another has too implicitly relied on the truth of what he has himself stated.”² Thus, a vendor will be bound by a misrepresentation relative to a lease, notwithstanding the presumption of law that the purchaser had notice of the covenants of the lease.³ However negligent the party may have been to whom the misrepresentation is made, it is not a ground of defence to the other. A vendor who falsely stated that the house sold was substantially and well built, was held not entitled to specific performance, though the purchaser might have ascertained its actual condition.⁴ A contract having been entered into on the faith of misrepresentations as to the profits of a theatre, of which the parties were joint owners, it was held that as the statements were founded on accounts which were equally open to both parties, they did not avoid the contract. This decision was, however, overruled on the ground that the misrepresentations were made with a view to the agreement, and that the accounts were so kept as to make it difficult, without the aid of an accountant, to draw a certain conclusion from them.⁵ The purchaser is not bound to institute an inquiry unless something has occurred to excite his suspicion, or unless there is something in the case or in the representation to put him on inquiry.⁶ Although he may have been put on his guard by the sale of the property “with all faults,” yet the vendor will not be permitted to say that the purchaser did not rely on his representations, nor will it prevent the avoidance of the sale on account of them.⁷

¹ *Wilson v. Short*, 6 Hare, 366, 377 ; *Flight v. Barton*, 3 M. & K., 282 ; *Pope v. Garland*, 4 Y. & C. Ex., 394.

² *Reynell v. Sprye*, 1 De G. M. & G., 660, 710 ; *Dobell v. Stevens*, 3 B. & C., 623.

³ *Van v. Corpe*, 3 M. & K., 269.

⁴ *Cox v. Middleton*, 2 Drew, 209.

⁵ *Harris v. Kemble*, 1 Sim., 111, 120 ; S. C., 5 Bligh, N. S., 730.

⁶ *Rawlins v. Wickham*, 3 De G. & J., 304 ; *Kent v. Freehold Land and Brick-making Co.*, L. R. 4, Eq. 598.

⁷ *Schneider v. Heath*, 3 Camp, 506.

§ 318. *Defence personal.*—Under the rule that a misrepresentation, to be a defence, must have been relied on by the party to whom it is made, the remedy is personal, applying only to him, his representatives and privies, and not extending to a person to whom he assigns the contract.¹ If, for instance, A. enter into an agreement with B. under circumstances of fraud on the part of A., which would prevent him from enforcing the contract, and B. assigns the contract to C., who is not affected by the original misrepresentation, the contract may be enforced against C.²

§ 319. *Must have been detrimental.*—A misrepresentation, to prevent specific performance, must have operated to the prejudice of the party to whom it is made; fraud without injury not entitling the party to relief, either at law or in equity.³ “For courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage.”⁴ Therefore, where A. caused a purchaser to believe that he was contracting with B. through his (A.’s) agency, when he was in truth contracting with A. himself, but it did not appear that the purchaser would not have contracted on the same terms with A., or that he had sustained any injury from the mistake, the contract was enforced.⁵ But the misrepresenta-

¹ Polhill v. Walter, 3 B. & Ad., 114. See *post*, § 337.

² Smith v. Clarke, 12 Ves., 477, 484.

³ Polhill v. Walter, *supra*; Morgan v. Bliss, 2 Mass., 236; Farrar v. Alston, 1 Dev., 69; Young v. Bumpass, 1 Freem. (Miss.) Ch., 241; Ide v. Gray, 11 Vt., 615; Clark v. White, 12 Pet., 178; Garrow v. Davis, 15 How., 272; Fuller v. Hogden, 25 Me., 243; Abbey v. Dewey, 25 Pa. St., 413; Bacon v. Bronson, 7 Johns Ch., 201; Turnbull v. Gadsden, 2 Strobb. Eq., 14; Morrison v. Lods, 39 Cal., 381; Wells v. Millett, 23 Wis., 64; Scott v. Shiner, 27 N. J. Eq., 185; Shaddle v. Disborough, 30 Ib., 370; Fore v. McKenzie, 58 Ala., 115. A representation by the vendor of land to the purchaser that an alley on the premises was only a private right of way for a few persons, when in fact it was a public way, was held not to constitute a defence to a suit brought by the vendor for specific performance. Wuesthoff v. Seymour, 22 N. J. Eq., 66. The soundness of this decision, which goes to the extreme verge of the rule, is questionable; a public easement being more burdensome than a private one of limited extent.

⁴ Story’s Eq. Juris., Sec. 203.

⁵ Fellowes v. Lord Gwydyr, 1 Sim., 63; S. C., 1 R. & M., 83. In this case, Sir L. Shadwell said: “If the plaintiff had been aware that the defendant Page

tion need only have operated to the prejudice of the defendant to a small extent ;¹ and the plaintiff will not be entitled to specific performance, even if he waive the fraudulent portion of it.²

would not have treated with any other person than Lord Gwydyr, and for that reason had concealed his own interest in the transaction, the relief might perhaps have been refused." Lord Lyndhurst, in affirming the decision, said that no injury to Page was proved ; but if the plaintiff had intended to injure him by the misrepresentation, it would, according to other cases, have barred his right. See *Flint v. Woodin*, 9 Hare, 618. In another case, the judge expressed his opinion that a person who attempted to deceive, though he did not succeed, could not obtain the extraordinary assistance of the court in a suit for specific performance. Lord Langdale, M. R., in *Clapham v. Shillito*, 7 Beav., 141. Where the plaintiff, who was the proprietor of a preparation of tea called *Howqua's Mixture*, filed a bill to restrain the defendant from selling a different mixture under the same name, and it was shown that the plaintiff had made some misrepresentations, the vice-chancellor said : "There has been such a degree of representation, which I take to be false, held out to the public, about the mode of procuring and making up the plaintiff's mixture, that, in my opinion, a court of equity ought not to interfere to protect the plaintiff till he has established his right at law. As between the plaintiff and defendant, the course pursued by the defendant has not been a proper one. But it is a clear rule laid down by courts of equity not to extend their protection to persons whose case is not founded on truth ; and as the plaintiff in this case has thought fit to mix up that which may be true with that which is false, in introducing his tea to the public, my opinion is, that unless he establishes his title at law, the court cannot interfere in his behalf." Sir L. Shadwell, V. C., in *Pidding v. How*, 8 Sim., 477. Approved by Lord Langdale in *Perry v. Truefit*, 6 Beav., 66. See *Hogg v. Kirby*, 8 Ves., 215 ; *Wright v. Tallis*, 9 Jur., 946.

¹ *Cadman v. Horner*, 18 Ves., 10. In this case, the court said : "Upon the evidence, the plaintiff has been guilty of a degree of misrepresentation operating to a certain, though small extent. That misrepresentation disqualifies him from calling for the aid of a court of equity, where he must come, as it is said, with clean hands. He must, to entitle himself to relief, be liable to no imputation in the transaction." Similar language was used in *Clermont v. Tasburgh*, 1 J. & W., 112.

² *Harris v. Kemble*, 1 Sim., 111 ; S. C., 5 Bligh, N. S., 730, 751. In a case where the question arose whether the misrepresentation avoided the entire contract, or only the part affected by the misrepresentation, Sir Thomas Plumer said : "There is no authority anywhere, no case where the court has, when misrepresentation was the ground of a contract, decreed the specific performance of it ; and nothing would be more dangerous than to entertain such a jurisdiction. The principle upon which performance of an agreement is compelled, requires that it must be clear of the imputation of any deception. The conduct of the person seeking it must be free from all blame. Misrepresentation, even to a small part only, prevents him from applying here for relief. The reason of this is obvious. If it be so obtained, the contract is void both at law and in equity. Where an agreement has been obtained by fraud, is the effect to alter it partially, to cut it down, or modify it only ? No, it vitiates it, *in toto* ; and the party who has been drawn in is totally absolved from obligation. If so, what equity has the other party, who by his misconduct has lost one contract, to call on the court for his benefit to make a new one ? If the defendant were willing to consent to it, and to enter into a new agreement, it would be a different case. But if he refuses, if he insists that he is absolved from it, what equity can there be in favor of the other ?" *Clermont v. Tasburgh*, 1 J.

§ 320. *Fraud how treated in equity.*—The term fraud has a more extensive signification than misrepresentation, which has been considered in the preceding sections of this chapter. For fraud, in the contemplation of a court of equity, may be said to include all acts of trick, cunning, dissembling, or other deceitful practice, involving a breach of legal or equitable duty, trust, or confidence justly reposed, by which an undue or unconscientious advantage is taken of another to his injury.¹ The devices by which fraud may be committed are so various, it is impossible to lay down any general proposition defining what shall constitute it. It has been truly said that “fraud is infinite; and were a court of equity to lay down rules how far they would go, and no further, in extending their relief against it, or to define strictly the species, or evidence, of it, the jurisdiction would be cramped, and perpetually eluded by the new schemes which the fertility of man’s invention would con-

& W., 112. Where A. contracted to sell to B. a tract of land which he represented contained two hundred and sixty acres, and for which he held a warrant, when in fact he only held a warrant for seventy acres, and the vendee paid for the whole tract, and the vendor afterward obtained a title to the residue, it was held in an action of ejectment in the nature of a bill for specific performance, that the purchaser was entitled to recover the part thus subsequently acquired. *Tyson v. Passmore*, 2 Pa. St., 122. Where a vendor gave a title bond for land, fraudulently representing that the land was unincumbered, there being at the time a mortgage on it, and took the vendee’s notes for the purchase money, and the vendee filed a bill for the legal title, when it appeared that the amount paid by the complainant and the mortgagee equalled the price to be paid, it was held that the complainant was entitled to a conveyance. *Rodman v. Williams*, 4 Blackf., 72. A contract will not be specifically enforced when there was a subsequent parol agreement to waive it and substitute for it a new contract. *Ryno v. Darby*, 20 N. J. Eq., 231. But where a written contract is varied by parol, after its execution, otherwise than as to title and the time for completion, the variation, to constitute a defence, must be accompanied by such a part performance as would enable the court to enforce it if it were an original independent agreement. *Price v. Dyer*, 17 Ves., 356; *Robinson v. Page*, 3 Russ., 114. A court of equity will not ordinarily compel the specific performance of a contract with variations or additions, or new terms to be made and introduced into it by parol evidence. For, in such a case, the attempt is to enforce a contract partly in writing, and partly by parol; and the writing is deemed to be higher evidence of the real intentions of the parties than parol proof can generally be, independently of the objection which arises under the statute of frauds. *Whitaker v. Vanschoiack*, 5 Oregon, 113.

¹ 1 Fonbl. Eq., Book 1, Ch. 2, Sec. 3; *Green v. Nixon*, 23 Beav., 535; *Bromley v. Smith*, 26 Ib., 671; *Garth v. Cotton*, 3 Atk., 757; *Kennedy v. Kennedy*, 3 Ala., 571; *Belcher v. Belcher*, 10 Yerg., 121; *Gale v. Gale*, 19 Barb., 249; *Smith v. Richards*, 13 Peters, 36; *Laidlaw v. Organ*, 2 Wheat., 195; *Tyler v. Black*, 13 How., 231.

trive.”¹ And again it was said, “the court very wisely hath never laid down any general rule beyond which it will not go, lest other means for avoiding the equity of the court would be found out.”² With the exception of fraud in obtaining a will, courts of law and equity have concurrent jurisdiction of every species of fraud not penal.³ There are, however, many cases of fraud which are not cognizable at law, or in which the remedy at law is wholly inadequate; while, with the exception mentioned above, equity takes notice of every kind of fraud.⁴ “In order to constitute fraud at common law, it is not enough to show that fraud, in the sense of misrepresentation and undue advantage of the position of the parties said to be imposed upon, has been committed; but the extent of the fraud must be brought home to the party to the action who is charged with it. In the case of fraud in the sense of a court of equity, a court of equity will take into account all the circumstances of the case—not only the act and intention of the party, but the circumstances under which the act was done; the position of the party who is said to be imposed upon; his being *inops consilii*; his being in a state of bodily, and therefore mental, weakness, and so on. *Non constat* these are sufficient to constitute legal fraud.”⁵ The power of equity to afford relief to the fullest extent, and in every detail, and to restore the party deceived as nearly to the position he would have occupied but for the fraud, often causes the court to exercise its jurisdiction notwithstanding there is a remedy at law.⁶

¹ Parke's Hist. of Chanc., 508.

² Lawley v. Hooper, 3 Atk., 278, per Lord Hardwicke.

³ Crane v. Conklin, Saxton, 346; White v. Jones, 4 Call, 253; Poore v. Price, 5 Leigh, 52; Haden v. Garden, 7 Ib., 157; Allen v. Hopson, Freeman (Miss.) Ch., 276; Boreing v. Singery, 4 Har. & Mchen., 398; Smith v. McIver, 9 Wheat., 532; Bacon v. Bronson, 7 Johns Ch., 201.

⁴ Colt v. Woolaston, 2 P. Wms., 156; Stent v. Bailis, Ib., 219; Franks v. Weaver, 10 Beav., 297; Glasse v. Marshall, 15 Sim., 71; Jones v. Bolles, 9 Wall, 364; Phalen v. Clark, 19 Conn., 421.

⁵ Kindersley, V. C., in Stewart v. Gt. Western R.R. Co., 2 Dr. & Sm., 438; 11 Jur. N. S., 627.

Bright v. Eynon, 1 Burr., 396; Slim v. Croucher, 1 De G. F. & J., 523; Stump v. Gaby, 2 De G. M. & G., 630.

§ 321. *Proof of fraud.*—Where relief is sought on the ground of fraud, the burden of proof is on him who alleges it, and the fraud must be proved as alleged.¹ But if there are other grounds of relief, and the fraud is not made out, relief may be granted in respect to such other matters when proved.² To establish the charge of fraud, the proof must be clear and conclusive, and circumstances of mere suspicion are not sufficient.³ Fraud may, however, be established by circumstantial evidence. “A deduction of fraud may be made not only from deceptive assertions and false representations, but from facts, incidents, and circumstances which may be trivial in themselves, but may, in a given case, often be decisive of a fraudulent design.”⁴ Where a *prima facie* case of fraud is made out, the burthen of showing that the transaction was fair rests upon the party who stands by it.⁵ In cases of fiduciary or confidential relations subsisting between the parties, the burthen of proof

¹ Blair v. Bromley, 5 Hare, 559; Jennings v. Broughton, 17 Beav., 234; Burton v. Blakemore, 2 Jur., 1062; Lomax v. Ripley, 24 L. J. Ch., 254; Smith v. Kay, 7 House of Lds., 750; Mowatt v. Blake, 31 L. T., 387; Brock v. McNaughtrey, 5 Mon., 216; Gibson v. Randolph, 2 Munf., 310; Gerde v. Hawkins, 2 Dev. Eq., 393; Blaisdell v. Cowell, 14 Me., 370; Eyre v. Potter, 15 How., 42.

² Wilde v. Gibson, 1 House of Lds., 607; Archbold v. Commrs. of Charitable Bequests, 2 Ib., 440; Billage v. Southee, 9 Hare, 535; Espey v. Lake, 10 Hare, 260; Baker v. Bradley, 7 De G. M. & G., 597; Traill v. Baring, 33 L. J. Ch., 521.

³ Trenchard v. Wanley, 2 P. Wms., 166; M'Queen v. Farquhar, 11 Ves., 467; Walker v. Symonds, 3 Swanst., 61; Hamilton v. Kirwan, 2 J. & L., 401; Smith v. Pawson, 25 L. T., 40; Bowen v. Evans, 2 House of Lds., 257; Pike v. Vigers, 2 D. & W., 267; Sanborn v. Stetson, 2 Story, 481; Hamilton v. Beal, 2 Har. & Johns, 414; Petrie v. Wright, 6 Sm. & Marsh, 642; Casey v. Allen, 1 A. K. Marsh, 465; Buck v. Sherman, 2 Dougl., 176; Gregg v. Sayres, 8 Pet., 244; Clark v. White, 12 Ib., 178. To set aside a deed, or give it a different effect from that which it naturally and legally imports, so far as the grantee or his legal representatives are concerned, would, against the defendant's answer, require not only the allegation, but the most unequivocal evidence of fraud on the part of the grantee. Watkins v. Stockett, 6 Har. & Johns, 435.

⁴ 2 Kent's Com., 484. Where there was no direct proof that a subsequent purchaser had knowledge of a previous sale, but the circumstances were strongly indicative of fraud on the part of the vendor and subsequent purchaser, specific performance was decreed in behalf of the original vendee. Rogers v. Odell, 36 Mich., 411. See Masterson v. Pullen, 62 Ala., 145.

⁵ Watt v. Grove, 2 Sch. & Lef., 502; Russell v. Jackson, 10 Hare, 213; Prince of Wales Assurance Co. v. Palmer, 25 Beav., 605. The fact that a party had the advantage in the transaction, without proof of fraud, will not defeat his petition in equity. Union Coal Mining Co. v. McAdams, 38 Iowa, 663.

is on the party in whom confidence was reposed, to show the fairness of the transaction.¹ Where proof has been introduced to show that a deed was fraudulently obtained, the party claiming under the deed must prove that the contents of the deed and their nature and effect were understood by the other party.² Whether fraud is established by the proof, is a question of law for the court.³

§ 322. *How fraud divided.*—Fraud may be actual, arising directly from facts and circumstances of imposition; or constructive, that is, presumed from the nature of the transaction or the relations of the parties. Fraud in matters of contract was divided by Lord Hardwicke,⁴ into four heads: 1st. Actual fraud arising from facts and circumstances of imposition; 2d. Fraud arising from the intrinsic nature and subject of the bargain; 3d. Fraud presumed from the circumstances of the bargain; 4th. Fraud inferred from the circumstances, and affecting some third person not a party to the transaction.⁵

¹ Matter of Holmes' Estate, 3 Giff., 347; Walker v. Smith, 20 Beav., 394; Dalton v. Dalton, 14 Nevada, 419.

² Moore v. Prance, 9 Hare, 304; Anderson v. Ellsworth, 3 Giff., 154; Davies v. Davies, 4 Ib., 417; Cartledge v. Radbourne, 14 W. R., 604; Selden v. Myers, 20 How., 506; Owing's Case, 1 Bland Ch., 370. See Harris v. Delahar, 3 Ired. Eq., 213; Michael v. Michael, 4 Ib., 349; Stamps v. Bracy, 1 How. Miss., 312.

³ Beers v. Botsford, 13 Conn., 146; Pettibone v. Stevens, 15 Ib., 19.

⁴ In Chesterfield v. Janssen, 2 Ves. Sen., 125.

⁵ A court of equity will refuse specific performance of a contract procured by fraud of the complainant. Harris v. Smith, 2 Coldw., 306; Clement v. Reid, 9 Sm. & Marsh., 535; Rogers v. Mitchell, 41 N. H., 154; Margraf v. Muir, 57 N. Y., 155. Where a father deeded land to his daughter as a gift, and afterward got possession of the deed fraudulently and destroyed it, the deed was restored to its legal force. Ward v. Webber, 1 Wash., 274. So, where a donor, after execution and delivery of a deed, obtained possession of it without the consent of the donee before it was recorded, it was held that the donee was entitled to call upon the donor for a conveyance of the legal estate. Tyson v. Harrington, 6 Ired. Eq., 329. A. gave a bond to B. to convey land to him upon payment of the purchase money. B. sold to C. at the same price, and C. paid the money to B., who paid it to A., whereupon B., to defeat C.'s purchase, surrendered the bond to A., who had notice of C.'s purchase, and absconded. Held that C. might compel A. to convey. Ward v. Ledbetter, 1 Dev. & Batt. Eq., 496. The courts of the United States will not enforce a contract clearly in fraud of a law of the United States, where no just exception can be taken to such law. Hannay v. Eve, 3 Cranch, 242. When a contract is tainted with fraud, the ground of relief is not that the writing does not express the intention of the parties, but that there was no agreement. In such a case there can be no reformation, for the reason that there is no contract to which the parties have assented, and to which the

§ 323. *Proof of invalidity of writing.*—Parol evidence will be admitted to control the operation of a deed or other written contract in itself complete and intelligible, in case of fraud, of which the injured party may avail himself in a court of law, as well as in a court of equity; and such evidence is admissible where a party applies to a court of equity to enforce a written contract, and the adverse party is allowed to show by testimony, that the instrument relied upon does not contain the true agreement of the parties, or the whole of it.¹ In the latter case, the court will withhold the exercise of its power, unless the party seeking relief will do full justice to the other party according to the facts which are made to appear to the court.² But oral contemporaneous evidence is not admissible to contradict the terms of a written agreement, or substantially vary the legal import thereof, provided the instrument is valid, and the parties designed to execute it in its existing form.³ The fraud which will

writing can be made to conform. Where a person is induced to forego the making of a will, by the promise of another, equity will enforce the obligation on the ground of fraud. *Norton v. Mallory*, 63 N. Y., 434; S. C., 1 Hun., 499; 3 T. & C., 640. A cause of action based on fraud, is different from that founded on a mistake merely, and one cannot be substituted on the trial for the other. *Ross v. Mather*, 51 N. Y., 108; *Burnham v. Walkup*, 54 Ib., 656; *Hadley v. Scranton*, 57 Ib., 424.

¹ *Nelson v. Wood*, 62 Ala., 175. In Pennsylvania, great latitude is allowed in the admission of parol proof to reform, modify, and even to extinguish a written instrument, in cases of fraud, mistake, or trust. In that State, the rule seems to have been established, that such evidence is admissible to show the acts or declarations of the parties at or about the time of the execution of the writing, unless it expressly contradict the instrument. *Rearich v. Swinehart*, 11 Pa. St., 233; and that a deed or other instrument, absolute on its face, may be controlled or otherwise defeated by a contemporaneous verbal understanding. The power of a court of equity to cancel an executed contract ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud is made clearly to appear; nor for alleged false representations, unless their falsity is certainly proved, and the complainant has been deceived and injured by them. *Atlantic Delaine Co. v. James*, 4 Otto, 207.

² *Dwight v. Pomeroy*, 17 Mass., 303.

³ Where specific performance of a written contract was sought, and it was resisted on the ground that the agreement actually entered into differed from the one in writing, it was held that the suit could not be successfully defended without showing that the difference was occasioned by fraud, accident, mistake, or surprise. *Stoutenburgh v. Tompkins*, 9 N. J. Eq. (1 Stockton), 332. Where an agreement for the sale of land is certain upon its face, and the bill charges neither fraud nor mistake in its execution, its terms cannot be changed by proof of a parol contemporaneous agreement that the purchase money was not to be paid at the time specified in the written contract, but to await a settlement of accounts between the parties. *Ware v. Cowles*, 24 Ala., 446.

let in such proof, must be fraud in the procurement of the instrument affecting its validity, or some breach of confidence in using a paper delivered for one purpose, and fraudulently perverting it to another. In such cases, the oral evidence tends to prove independent facts, which, if established, avoid the effect of the written agreement by facts *dehors* the instrument, but do not attempt to contradict or vary it.¹

§ 324. *Portion of agreement fraudulently omitted.*—Upon proof of fraud in the omission of material stipulations in a written contract, a court of equity will admit parol evidence to establish the agreement as it was understood and concluded between the parties, and, after reforming the contract according to the truth, will proceed to enforce it.² A bill alleged that the defendants agreed to insert in the deed from them to the plaintiff a covenant that the land conveyed contained seven acres, and, if it fell short of that quantity, they would make good the deficiency; that a deed was drawn containing such a covenant, and that the defendants erased it fraudulently, and without the plaintiff's knowledge, and induced him, by false representations, to accept the deed in the belief that the clause as originally inserted was embraced in the conveyance as executed and delivered by them. These allegations having been found to be true, it was held that the plaintiff was entitled to have the deed reformed so as to set forth the whole contract.³ Where the owner of land bounded on the Hudson River, secretly intending to sell the lot as it originally existed, made the purchaser believe that he was also buying a wharf on the lot, or adjacent thereto, and the wharf was not included in the conveyance, the vendee having paid the vendor the price of the whole property, it was held that he was entitled

¹ Towner v. Lucas, 13 Gratt., 705; Broughton v. Coffey, 18 Ib., 184. Series of facts constituting an adverse equity, where a recognition of these is necessary to defeat fraud. Hartzel v. Reiss, 1 Binney, 289; Park v. Chadwick, 8 Watts & Serg., 98; Miller v. Henderson, 10 Serg. & R., 290; Clark v. Partridge, 2 Barr, 13; S. C., 4 Ib., 166.

² Dwight v. Pomeroy, *supra*; Phyfe v. Wardell, 2 Edw. Ch., 47.

³ Metcalf v. Putnam, 9 Allen, 97.

to a decree for the conveyance of the whole ; but that as the wife of the vendor executed the deed in good faith, supposing that it did not, and that the vendee knew that it did not embrace the wharf, she would not be compelled to join in the conveyance.¹ A purchase is made of a lot which at the time is inclosed. The inclosure is fifty-one feet deep ; but the lot, without having been measured by the purchaser, is described in the contract as well as in the deed, as being but forty-seven feet in depth. The purchaser takes possession of all within the inclosure ; but the vendor subsequently removes the fence so as to exclude four feet of the original lot, insisting that the purchaser still had all that her conveyance calls for. The purchaser brings an action of ejectment and offers parol evidence of the circumstances and terms of the bargain. Held that such evidence is admissible to show fraud on the part of the vendor.²

§ 325. *Fraudulent use of writing.*—A court of equity will interfere to prevent the fraudulent use of a written instrument for a purpose not contemplated when it was made, where there was no mistake or fraud in its execution ; and it makes no difference that the instrument has been recorded.³ Accordingly, where it was shown that during a negotiation for the lease of a building it was verbally agreed between the parties that only the building in its then condi-

¹ Wiswall v. Hall, 3 Paige Ch., 313.

² Flagler v. Pleiss, 3 Rawle, 345. But see Elder v. Elder, 10 Me., 80.

³ Young v. Peachey, 2 Atk., 256 ; Oliver v. Rowland, 4 Rawle, 141 ; Thomson v. White, 1 Dallas, 424 ; Campbell v. M'Clanachan, 6 Serg. & Rawle, 172 ; Lyon v. Huntington Bank, 14 Ib., 283 ; Hultz v. Wright, 16 Ib., 345. "It is enough, that though the parties acted in mutual good faith at the inception of the transaction, an attempt is made to wrest the instrument to a different purpose not contemplated, or to use it in violation of the accompanying agreement. It is as much a fraud to obtain a paper for one purpose, and to use it for a different and unfair purpose, as to practice falsehood or deceit in its procurement. The primary honesty of purpose but adds to the moral turpitude of the subsequent efforts to escape from it ; or, when moral guilt cannot be imputed, a legal delinquency attaches upon an attempted abuse of the writing, sufficient to subject it to the influence of the oral evidence." Bell, J., in Rearich v. Swinehart, 11 Pa. St., 233. And see, to the same effect, Parks v. Chadwick, 8 Watts & Serg., 96. Where A. purchases real estate from B., and C. having loaned A. money to pay for the land, B., by agreement of all the parties, conveys to C., who gives a bond for title upon repayment of the money loaned, and interest, specific performance of the agreement will be decreed. Archer v. McCray, 59 Ga., 546.

tion was to be embraced in the lease ; that the lessor was to have the right to have the second story for his own use ; that the lessees procured the lease to be written, and when it was read to the lessor he objected to signing it because it did not reserve his right to erect the second story ; that the lessees replied that it would make no difference whether the right was reserved in the lease or not, as it was agreed that the lessor was to have the right ; that upon these assurances, he signed the lease ; and that the second story was afterward built without objection from the lessees, and without any claim being then made to it by them, but with their assent and approval ; in an action of ejectment, brought by the lessees to recover the second story, the court, upon a cross complaint, filed by the lessor, alleging these facts, directed the lease to be reformed and judgment to be rendered for him.¹ In a sale of land by A. to B., a portion of the purchase money was paid in land, and a note given for the balance secured by a mortgage on the land, with a provision that if B. should fail to pay the note at maturity, B. should reconvey the land to A., and the latter surrender the note. Afterward B., not being able to pay the note, it was mutually agreed that the sale should be rescinded, and that as the deed and mortgage had not been

¹ *Murray v. Dake*, 46 Cal., 644. In *Renshaw v. Gans*, 7 Pa. St., 117, the court said : " All the cases show that to pave the way for the reception of oral declarations, it is not necessary to prove that a party was actuated by a fraudulent intention at the time of the execution of the writing. His original object may have been perfectly honest and upright. But if, to procure an unfair advantage to himself, he subsequently deny a parol qualification of the written contract, it is such a fraud as will, under the rules, operate to let in evidence of the real intent, and final conclusion of the contractors." Parol evidence, to show that a deed, absolute on its face, was intended as a mortgage, or other conditional conveyance, without proof of fraud, or mistake in its execution, or in the consideration, is not admissible. But if the answer admit that the contract was intended to be conditional, or in trust to any extent or for any purpose, the complainant may prove by parol the true condition or trust. A statement, however, in the answer that the consideration was larger than that recited in the deed, will not authorize parol testimony to show that the contract was not a sale, but a mortgage, in contradiction to both the deed and the answer. A recital in the conveyance is not conclusive evidence as to the question whether the consideration has been paid, or only agreed to be paid. Nor can the circumstance that a deed recites a consideration either larger or smaller than that which was actually given, alter the character, or impair the conclusive effect of the instrument as a document of title. *Thomas v. McCormack*, 9 Dana, 108.

recorded, a destruction of them and of the note would effect that object. A., however, died before anything could be done in the matter, and B., having caused the deed to be recorded, sold the land to C., his brother-in-law, for one-third its value, he being acquainted with all the circumstances. Soon after, concealing from the administrator of A. the fact that B. had caused the deed to be recorded, they united in burning the deed, note, and mortgage. It was held that a decree must be entered cancelling the deed from A. to B., and its fraudulent registration, and the deed from B. to C.¹

§ 326. *How fraud affects rights of third person.*—Under the rule that to entitle a person to specific performance, he must be a claimant for value, “where once a fraud has been committed, not only is the person who has committed the fraud precluded from deriving any benefit from it, but every other person is so likewise, unless there has been some consideration moving from himself. If there has been consideration moving from a third person, and he was ignorant of the fraud, such third person stands in the ordinary condition of a purchaser without notice. But where there has been no consideration moving from himself, a third person, however innocent, can derive no sort of benefit or advantage from the transaction.”²

§ 327. *Fraud shown by insufficiency of consideration.*—The consideration may be so grossly inadequate as to be evidence of fraud; for it cannot be presumed that any one of ordinary intelligence would make such a bargain, unless deceived or subject to undue influence.³ In a case of that

¹ Neal v. Speigle, 33 Ark., 63.

² Wood, V. C., in Scholfield v. Templer, Johns, 156; Berry v. Whitney, 40 Mich., 65.

³ See Gwynne v. Heaton, 1 Bro. C. C., 8; Haygarth v. Wearing, L. R. 12, Eq. 320; James v. Morgan, 1 Lev., 111; Butler v. Haskell, 4 Dessaus Eq., 651; Os-good v. Franklin, 2 Johns Ch., 1; Gifford v. Thorn, 9 N. J. Eq. (1 Stockton), 702; Coffee v. Ruffin, 4 Coldw., 507; Byers v. Surget, 19 How., 303; Wright v. Wilson, 2 Yerg., 294; Hardeman v. Burge, 10 Ib., 202; Deaderich v. Watkins, 8 Humph., 520; Judge v. Wilkins, 19 Ala., 765; Warner v. Daniels, 1 Woodbury & Minot, 90; Morris v. Philliber, 30 Mo., 145. A complainant seeking

character the relief is granted, not on account of the inadequacy of the consideration, but on the ground of fraud as shown thereby.¹ Where a contract by fraud or mistake is made to include more than the vendor agreed to sell, it cannot be enforced against him in equity, although the average estimate of witnesses makes the value of the property no more than was to be paid. The vendor has a right to put his own price upon his property, instead of having it fixed for him by witnesses.² But if no fraud is shown, the fact that the property has depreciated in value since the sale is no cause for the interference of a court of equity in behalf of the purchaser. Where, between the time of a contract for sale and the conveyance, streets were laid out in a way the parties did not anticipate when they entered into the contract, which rendered the shape of the lots less desirable, it was held that there was no ground for the vendee, either to refuse a specific performance of the agreement, or to base a claim for compensation, if there was no warranty or misrepresentation on the part of the vendor.³

§ 328. *Relevancy of proof as to value.*—Although the mere circumstance that the sum paid is greatly less than the property contracted to be purchased is worth, will not itself be sufficient to set aside the agreement, yet it may be evidence of fraud and imposition, which, coupled with other considerations, frequently occasions the interference of a court of equity.⁴ An inquiry into the value may be important in determining whether fraud or mistake has actually intervened. But the legal character of the transac-

specific performance of a contract for the sale of land must satisfy the court that the claim is fair and just, the contract equal in all its parts, and founded on a sufficient consideration. If he fail in establishing any of these points, he will be left to his remedy at law. *Modisett v. Johnson*, 2 Blackf., 431; *Johnson v. Dodge*, 17 Ill., 433.

¹ *White v. Flora*, 2 Overton, 426; *Baker v. Howell*, 4 Johns Ch., 118; *Newman v. Meek*, Freeman (Miss.) Ch., 441; *Green v. Thompson*, 2 Ired. Eq., 365; *McCormick v. Malin*, 5 Blackf., 509; *Eyre v. Potter*, 15 How., 43; *Borell v. Dann*, 2 Hare, 450; *Falcke v. Gray*, 4 Drew, 651; *Summers v. Griffiths*, 35 Beav., 27.

² *Chambers v. Livermore*, 15 Mich., 381. ³ *Morgan v. Scott*, 26 Pa. St., 51.

⁴ *White v. Flora*, *supra*.

tion does not depend upon the question of the sufficiency of the price.¹

§ 329. *Fraud of vendor relieved against.*—Where a contract on the part of the complainant is fraudulent, and the other party is induced to enter it by the fraud, or where a delinquency on the part of the complainant makes the contract a hardship for which an adequate compensation cannot be devised, the court will rescind the contract if the parties can be left in the same condition they were in before the contract was made. So, if the vendor seeks by fraud to deprive the purchaser of the benefit of the contract, specific performance will be decreed at the suit of the latter. A. gave to B. the following instrument: "The trustees of the town of C. will please convey lot number thirty-two to B., who has purchased it of me, and for which I have received value in full. Nov. 2, 1816." This order was sold to D., and, in the meantime, A. procured a conveyance to himself. On a bill to compel A. to convey to D., it was held that A. could not set up non-payment of the notes given to him by B. against his express declarations in the order to the prejudice of D.² A. agreed to give B. a deed of land owned by A.'s wife, with full covenants, fifty dollars to be paid down and two hundred and fifty dollars secured by bond and mortgage. The fifty dollars were paid, and B. took possession of the land and made improvements thereon. The deed was never executed, though B. was ready to give the stipulated security for the balance of the purchase money. These facts being known to C. and D., they combined with A. to defraud B., and, in pursuance thereof, A. and his wife executed a deed of the land to C. in trust for D., who paid the purchase money. C. brought ejectment against A. B. filed a bill against A. and his wife and C. and D. for specific performance of the agreement, and for an injunction against the action at law. The court granted the relief

¹ Chambers v. Livermore, *supra*.

² Fugate v. Hansford, 3 Litt., 262.

sought against C., the grantee, with notice, but refused to enforce the agreement against A. and his wife.¹

§ 330. *False recital in conveyance.*—A deed will not necessarily be rendered invalid by an untruthful recital of the consideration, though it may in certain cases have that effect.² If the transaction, which is the foundation of the deed and the consideration, are fraudulently stated, the deed will not be binding in equity, even if it be so at law.³ In cases of fiduciary relations subsisting between the parties, the deed must contain a fair and truthful statement of the transaction.⁴ The false statement of the consideration of a deed, or other suspicious circumstances, may transfer the burthen of proof to the party seeking to uphold it.⁵

§ 331. *Unlawful agreements.*—Gaming contracts, in which are included time contracts in stocks, cannot be en-

¹ *Annan v. Merritt*, 13 Conn., 478.

² *Bowen v. Kirwan*, Ll. & G., 47; *Uppington v. Bullen*, 2 Dr. & W., 184; *Gibson v. Russell*, 2 Y. & C. C. C., 104. In a suit by an incorporated company for the specific performance of the contract of the defendant to take two thousand ten-pound shares in the company, and pay for them in such numbers and at such times as should be required for the purposes of the company, it appeared that the defendant's name had been placed on the register of shareholders, and that a call had been made upon him which he refused to pay. At the same time the contract was entered into, the board of directors had agreed with the defendant to pay him four thousand pounds in consideration of services rendered by him for the company. This sum was to be paid twelve months after the shares had been paid in full. Subsequently, the directors called on the defendant to pay up one thousand of his shares, which he refused to do, alleging that the two agreements constituted in reality one contract for the issue of the shares at a discount; that he had not rendered the company any services; and that the contract was made divisible in order to evade the articles of association, which prohibited the directors from issuing shares at a price below par without the consent of a general meeting, and that no such consent had been given to the contract with the defendant. It was held that as the defendant had united with the directors to defraud the company, he could not set up this fraud for the purpose of invalidating the agreement to take and pay for the shares; that as the parties had provided for a piecemeal fulfilment of the one agreement, the court could compel the performance of a part; and that in the absence of any proof of bad faith, the resolution of the directors to call up the amount of the shares was conclusive evidence that the money was required for the purposes of the company. Specific performance of the contract to take and pay for the shares was accordingly decreed. *Odessa Tramways Co. v. Mendel*, L. R. 8, Ch. D. 235.

³ *Watt v. Grove*, 2 Sch. & Lef., 501.

⁴ *Ahearne v. Hogan*, Dru., 310; *Clifford v. Turrell*, 1 Y. & C. C. C., 138; *Gibson v. Russell*, *supra*; *Uppington v. Bullen*, *supra*.

⁵ *Griffiths v. Robbins*, 3 Mad., 105; *Watt v. Grove*, *supra*; *Harrison v. Guest*, 6 De G. M. & G., 434; 8 House of Lds., 481.

forced; nor money lost in gaming, or lent with knowledge that it was to be used for that purpose, be recovered; nor an instrument be set aside, the consideration of which is an illegal wager.³ But it has been held, as we have seen, that a suit in equity may be maintained to have a gaming security delivered up and cancelled.⁴

§ 332. *Contracts affected with usury.*—As already stated, a court of equity will not enforce a usurious contract in behalf of the lender.⁵ And if the borrower seeks relief in equity against the usurious contract, he will not be relieved except upon the terms of paying the lender what is lawfully due him.⁶ But the borrower may maintain a suit in equity to compel the giving up of a collateral security for a usurious debt, although he might defend against it in an action at law.⁷

§ 333. *Compulsory contract.*—A compulsory agreement of a person cannot be enforced against him, whether he is under duress, or in extreme terror from threats; it being a rule in equity, that the court will protect one who is not a free agent, and who is incapable of protecting himself.⁸ Equity regards with jealousy a contract entered into by a person while restrained of his liberty, and if there be reason to suspect oppression, or imposition, the contract will be set aside.⁹ So, a contract extorted from another by reason

¹ 1 Fonbl. Eq., Book 1, Ch. 4, Sec. 6; *Bosanquet v. Dashwood*, Sel. Cas. Temp., 41; *Rawdon v. Shadwell*, Ambler, 269; *Wilkinson v. L'Eaugier*, 2 Y. & C., 366; *Brua's Appeal*, 55 Pa. St., 294. See, however, *McKinney v. Pope*, 3 B. Mon., 93; *Bonner v. Montgomery*, 9 Ib., 123; *McKimball v. Robinson*, 1 M. & W., 434; *Machier v. Morse*, 2 Gratt., 257; *White v. Buss*, 3 Cush., 448.

² *Thomas v. Cronie*, 16 Ohio, 54.

³ *Ante*, § 217.

⁴ *Ante*, § 216. And see 1 Fonbl. Eq., B. 1, Ch. 1, Sec. 3, *note H*; *Fanning v. Dunham*, 5 Johns Ch., 122.

⁵ *Whitehead v. Peck*, 1 Kelly, 140; *Ballinger v. Edwards*, 4 Ired. Eq., 449; *Rogers v. Rathbun*, 1 Johns Ch., 367; *Fanning v. Dunham*, *supra*.

⁶ *Peters v. Mortimer*, 4 Edw. Ch., 279.

⁷ *Evans v. Llewellyn*, 1 Cox, 340; *Atty. Genl. v. Sothon*, 2 Vern., 497; *Crowe v. Ballard*, 1 Ves., 215; *Hill on Trustees*, 156; *Jeremy on Eq. Juris.*, Book 3, Pt. 2, Chap. 3, Sec. 1.

⁸ *Hinton v. Hinton*, 2 Ves. Sen., 634; *Underhill v. Harwood*, 10 Ib., 219; *Nichols v. Nichols*, 1 Atk., 409; *Griffith v. Spratley*, 1 Cox, 383; *Falkner v. O'Brien*, 2 B. & Beatt., 214. See *Williams v. Bayley*, L. R., 1 House of Lds., 218; *French v. Shoemaker*, 14 Wall, 233.

of his extreme necessity and distress, without direct restraint or duress, will justify its rescission.¹ Duress subsequent to the contract will not of course be a ground for rescission.² Where a father was induced to give security for his son's debt by an implied threat that otherwise the son would be prosecuted for felony, it was held that the father was not bound.³ But a contract entered into by a person in prison may be enforced.⁴ Although a court of equity will not usually relieve any one from the consequences of a voluntary act in fraud of the law, yet it will not permit a person to profit by a written instrument which is extorted by exciting false alarms as to legal liability when there is such a relation of confidence as gives one a special power over the other.⁵

§ 334. *Person committing fraud deemed a trustee.*—In cases of fraud a court of equity will sometimes imply a trust, and enforce it.⁶ Where one received the title to land as security for money advanced by him to the vendor for the vendee, promising to reconvey the same to the vendee on repayment of the money so advanced with twenty per cent. interest, but fraudulently sold the land to another, who bought with notice, repayment having been tendered within the time stipulated, it was held that the party defrauded was entitled to a decree for specific performance, or pecuniary compensation for the property, and that the defendant should be adjudged a trustee of the plaintiff.⁷ Where a husband purchased land, giving therefor a promissory note, falsely representing that the maker was responsible, and caused the deed to be made out to his wife, who paid nothing, it was held that although she was not a party to the fraud, she could not protect herself as a *bona*

¹ Pickett v. Loggon, 14 Ves., 215; Carpenter v. Elliot, cited 2 Ves., 493; Beasley v. Maggrath, 2 Sch. & Lef., 31; Ramsbottom v. Parker, 6 Mad., 6; Wood v. Abrey, 3 lb., 216.

² Fulton v. Loftis, 63 N. C., 393.

⁴ Brinkley v. Hann, 1 Dru., 175.

⁶ Wheeler v. Reynolds, 66 N. Y., 227.

³ Williams v. Bayley, *supra*.

⁵ Barnes v. Brown, 32 Mich., 146.

⁷ Jackson v. Gray, 9 Ga., 77.

fide purchaser for value, but was affected by all the equities which the vendor was entitled to enforce against her husband.¹ If an heir fraudulently prevents his ancestor from making a devise which he contemplates, a court of equity will hold him a trustee for the intended devisee. If the owner of land, even by fraudulent silence, encourages another to purchase the land from one having no title, equity will compel him to make the title good. Equity holds, in such cases, that the party is guilty of a fraud in availing himself of a legal right to the prejudice of another, and will not permit him to profit by his fraud.²

§ 335. *Fraud of person assuming to act for another.*—A court of equity will take from a party the benefit he may have derived from his own fraud, imposition, or undue influence, by preventing acts intended to be done for the benefit of a third person.³ A person who assumes to act as agent in redeeming land sold for taxes, will be deemed to have acted in that capacity, and cannot take advantage of such act to obtain a title to the land in his own name, but is answerable, to those in whom the title rested, in the character first assumed.⁴ So, where L., by fraud and misrepresentation, induced F. to sell him certain land, pretending that he was acting for C., and that he was purchasing it for C.'s benefit, it was held that L. could not secure the advantage of a purchase he could not have made for his own benefit if F. had known that such was his object.⁵ F., a very old man and a bachelor, intending

¹ Mendenhall v. Treadway, 44 Ind., 131. See Dugan v. Vattier, 3 Blackf., 245; Gallion v. M'Caslin, 1 Ib., 91; Aldridge v. Dana, 7 Ib., 249; Aubuchon v. Bender, 44 Mo., 560.

² Anthony v. Leftwitch, 3 Rand., 238.

³ Story's Eq. Juris., Sec. 256. See Bellamy v. Sabine, 2 Phil., 425.

⁴ Shedda v. Sawyer, 4 McLean, 181.

⁵ Johnson v. Cown, 22 Wis., 329. Where there are strong suspicions that a contract for the conveyance of land was fraudulently made by the agent of the defendant, by collusion with the complainant, and it is proved to have been made in the absence of the defendant, equity will not enforce specific performance. Hunter v. Griffin, 19 Ill., 251. A. employs B. as his agent to purchase a house for him. B. makes the purchase, takes the deed in his own name, and pays his own money for it, A. cannot compel B. to convey. Wallace v. Brown, 2 Stockt. Ch., 308; Story's Eq. Juris., Sec. 1200, note 1.

to give to the complainants, who were his nephews and nieces, ten thousand dollars by his will, consulted with V., a nephew in whom he had great confidence, on the subject of the proposed bequest, and the latter told him that he would undertake to pay the money to the complainants if he would intrust him with its payment; and that if he would bequeath to him twenty thousand dollars for his own benefit, and ten thousand dollars for the complainants, or would intrust him with what was intended for the complainants, or would include the gift of ten thousand dollars in the bequest to him, he would collect and pay it to the complainants. F. thereupon made his will, and bequeathed to V. thirty thousand dollars, without expressing any trust or making any bequest to the complainants. F. afterward told V. that though he had by the will given him thirty thousand dollars, he intended ten thousand dollars of it to go to the complainants, and that he would not revoke, cancel, or change the bequest, if V. would pay ten thousand dollars of it to them, which V. promised to do. F., relying on the assurance of V., died without changing the bequest. It was held that the complainants were entitled to specific performance of V.'s promise.¹ A. contracted land to C. without authority from B., the owner. Afterward, B. quit-claimed the premises to C., and delivered the deed to A. as an escrow, for him to deliver to C., upon the performance of certain conditions. A., confederating with C. to defraud B., delivered the deed to C. without the conditions being fulfilled. Held, that C. should restore the property, accounting for the rents and profits; and that C. could not claim the land under the deed from B. by complying with the original contract made with A., but that having repudiated the contract, it was too late to ask for specific performance.²

§ 336. *Party seeking to benefit himself by fraud.*—Although a person may not have originally been concerned in

¹ Williams v. Vreeland, 29 N. J. Eq., 417.

² Clement v. Evans, 15 Ill., 92.

a fraudulent transaction, yet if he seek to take advantage of it by fraud, he will not be permitted to avail himself of it.¹ A. held a title bond to land. After paying the purchase money he conveyed the land to B., who did not have the deed recorded. B. sold the land to C., and returned the deed to A., with directions to cancel it and convey directly to C. A conveyance was accordingly executed to C. with full covenants, and for a sufficient consideration. C. having filed a bill for specific performance of the contract of sale, B. asserting no claim, it was held that as the parties had knowledge of the deed to the plaintiff, they could not attack his title, on the ground that A., by his deed to B., had divested himself of title, and that the return of the instrument did not reinvest the title in A.² Where a paper was deposited with a third party to be held by him as an escrow, not to be delivered as a deed, but upon the order of the vendor, and the purchaser fraudulently obtained it, it was held that the purchaser could not maintain a bill thereon for specific performance of the alleged contract.³

§ 337. *Person injured can alone complain of fraud.*—A contract of conveyance will not, as a rule, be set aside for fraud, except at the option of the party defrauded.⁴ Although there may be cases in which a purchaser who has completed his contract may impeach a title founded upon fraud committed upon his vendor, yet the right to complain of a fraud is not a marketable commodity; and if it appears that an agreement for purchase has been entered into for the purpose of acquiring such a right, the vendee cannot call upon a court of equity to enforce specific perform-

¹ Brown v. Bonner, 8 Leigh, 1.

² Williams v. McGuire, 60 Mo., 254.

³ Booth v. Hartley, 3 W. Va., 478. Where a government officer purchases a quantity of sugar under an agreement which he is not authorized to make, and the sugar is taken by the government, a court of equity has jurisdiction to enforce the agreement against him personally and fix the compensation to be paid for the same. Yulee v. Canova, 11 Fla., 9.

⁴ Ayers v. Hewitt, 19 Me., 281; Jones v. Hill, 9 Bush, 692; Story's Eq. Juris., Sec. 1040. See *ante*, § 318.

ance of the agreement. Such a transaction savors too much of maintenance for the court to lend it its sanction.¹

§ 338. *When judgment relieved against for fraud.*—Although there may be such fraud upon the court, and upon the opposite party, in judicial proceedings, as will vitiate a judgment obtained thereby, yet fraud in such a case is made up of the same constituents as in any other case, and the same state of facts must appear. There must be fraudulent allegations and representations designed and intended to mislead, with knowledge of their falsity, and damage resulting.² A judgment or award obtained by false testimony, fraudulently given by the party benefited thereby, is voidable; and a gross exaggeration of value knowingly and wilfully made, especially in the absence of the adverse party, would be sufficient evidence of fraud to invalidate a judgment or assessment of damages.³ The fraud for which a court of equity will set aside a judgment or decree, must be actual, and not merely constructive. It must have occurred in the procuring of a judgment or decree, be something not known to the other party at the time, and for not knowing which he is not chargeable with negligence. Relief can only be granted upon some new matter of equity not arising in the former case.⁴

§ 339. *Statutes as to fraud against creditors.*—An agreement entered into by a debtor to delay, deceive, or deprive creditors of what is justly due them, is fraudulent and void at common law;⁵ and statutes in affirmance of the common law in this respect, were passed at an early period, which,

¹ De Hoghton v. Money, L. R. 2, Ch. 164.

² Hunt v. Hunt, 72 N. Y., 217; State of Mich. v. Phoenix Bank, 33 Ib., 9.

³ Jordan v. Volkenning, 72 N. Y., 300.

⁴ Foster v. Wood, 6 Johns Ch., 87. In this case, it was stated by Chancellor Kent that chancery would not relieve against a judgment at law on the ground of its being contrary to equity, unless the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defence, or unless he was prevented from availing himself of the defence by fraud or accident unmixed with negligence or fault on his part.

⁵ Copis v. Middleton, 2 Mad., 428; Cadogan v. Kennett, Cowper, 432; Barton v. Vanheythuysen, 11 Hare, 132; Pope v. Wilson, 7 Ala., 690; Tripp v. Childs, 14 Barb., 85; Clark v. Douglass, 62 Pa. St., 408.

in the suppression of fraud, have always received a liberal interpretation both at law and in equity.¹ The most noted of these statutes, and the one which has been substantially re-enacted in most of the States, is that of 13 Elizabeth, Ch. 5, against fraudulent conveyances of land to defeat or delay creditors. The rules of construction of these statutes are the same at law and in equity, and the jurisdiction concurrent; though there are cases of fraud not reached by statutory provisions, and where the only remedy is in equity.² A conveyance by one indebted at the time, by which the grantor secures some benefit to himself at the expense of creditors, or by which creditors are prevented from compelling an immediate appropriation of the debtor's property to the payment of his debts, is fraudulent and void; as where the grant is of all the property of the debtor in trust for himself, and for his wife during his life.³

§ 340. *Contract in fraud of creditors.*—The question of fraud depends upon the illegal intent.⁴ Equity will not enforce a contract entered into by the plaintiff for the purpose of defrauding a creditor.⁵ If the parties to an agreement for the sale of real estate, after the payment of the purchase money, but before the delivery of the deed, make an arrangement to defraud the creditors of the vendee, a court of equity upon a suit by a creditor, will deem the equitable title vested in the vendee, and the statute of frauds will not be a bar to the setting up of such title.⁶ Where distributees agreed that no administration should be taken, and that one of them should hold and manage the property for the joint benefit of all, he being in possession and the apparent

¹ Story's Eq. Juris., Sec. 352. These statutes were those of 50 Edw. III., Ch. 6; 3 Henry VII., Ch. 4; 13 Eliz., Ch. 5; and 27 Eliz., Ch. 4.

² See *Weed v. Pierce*, 9 Cowen, 722; *Bosford v. Beers*, 11 Conn., 370; Story's Eq. Juris., Sec. 352.

³ *Young v. Heermans*, 66 N. Y., 382, and cases cited.

⁴ *Bird v. Aitken*, 1 Rice Ch., 73; *Peters v. Smith*, 4 Rich. Eq., 197; *Williams v. Jones*, 2 Ala., 314; *Bullock v. Irving*, 4 Munf., 450; *Clemens v. Davis*, 7 Pa. St., 263; *Hickman v. Quinn*, 6 Yerg., 36; *Thornton v. Davenport*, 1 Scam., 296.

⁵ *St. John v. Benedict*, 6 Johns Ch., 111. ⁶ *Forsyth v. Clark*, 3 Wend., 637

owner of it at the time of the death of the intestate, and the intestate much indebted at the time of his decease, it was held that such agreement could not be enforced in equity.¹ A.'s house having been levied on and advertised for sale, on an execution against A. and B., C. bid off the premises at A.'s request, A. paying the money, and the sheriff making the deed to C., which was done to protect the premises from the creditors of A., on a bill filed by A. against C., praying for a conveyance to him, the court denied relief.² A banker, who held bills and acceptances as a security for advances made to a customer, received from the brother of the customer a guaranty that the loss of the bank should not exceed two thousand pounds. This arrangement was entered into after the customer had commenced proceedings for winding up his affairs, and it was without the knowledge of his other creditors, with a view to prevent the bank from opposing a composition. In a suit brought by the banker for specific performance of the agreement, it was held that as it was calculated to give one creditor a secret advantage over the others, it could not be upheld; and the bill was dismissed with costs.³

§ 341. *When conveyance deemed void as against creditors.*—A deed is not necessarily fraudulent even against existing creditors, merely because it is voluntary. The want of consideration is only a circumstance from which, with other circumstances, fraudulent intent may be inferred. Still

¹ Allen v. Simons, 1 Curtis, 122. In this case, Curtis, J., said: "Distributees have no right whatever to intermeddle with the personal property of the deceased for any other purpose than to do such acts as may be necessary to preserve it until an administrator can be appointed. Any other acts of control, by any person, constitute him an executor *de son tort*, and subject him as a penalty to the payment of the debts of the deceased. When, therefore, this bill shows that the children of William Simons, senior, instead of subjecting this property to the payment of his just debts in a due course of administration, made an agreement that no administration should be taken, that they would wholly disregard the rights of creditors, and treat the property as their own, it shows an agreement which a court of equity cannot enforce. It is not based on any equitable right of the parties. It is a violation of the common law. It tends to defraud creditors. It is plainly forbidden by public policy; and is inconsistent with that system of statute law providing for the just and orderly settlement of intestate estates."

Forsyth v. Clark, 3 Wend., 637. ² McKewan v. Sanderson, L. R. 20, Eq. 65.

less is it *per se* fraudulent and void as against subsequent purchasers. To impeach the conveyance, there must be circumstances showing actual fraud, and that it was contemplated. If a voluntary conveyance is made immediately before engaging in some hazardous business, or obligations are incurred so soon after the conveyance as to warrant a presumption that actual fraud was intended, or other circumstances lead to the same inference, a deed will be adjudged fraudulent and void as well against the subsequent as existing creditors.¹

§ 342. *How subsequent purchaser affected by voluntary conveyance.*—In England, under the statute 27 Eliz., Ch. 4,²

¹ Story's Eq. Juris., Sec. 361; *Young v. Heermans*, 66 N. Y., 374, per Allen, J. See *Mackay v. Douglass*, L. R. 14, Eq. 106; *Saxton v. Wheaton*, 8 Wheat., 229; *Ridgway v. Underwood*, 4 Wash. C. C., 129; *McPherson v. Kingsbaker*, 22 Kansas, 646. "Upon a full examination of all the cases, the legal principle appears to be established, that when a voluntary conveyance is made and received with an actual intent to defraud the then existing creditors of the grantor, it is not a *bona fide* conveyance which can protect the grantee against the claims of subsequent creditors." Walworth, Ch., in *King v. Wilcox*, 11 Paige Ch., 589. "It is well settled, that if a debtor makes a conveyance, with the purpose of defrauding either existing, or future creditors, it may be impeached by either class of creditors." *Day v. Cooley*, 118 Mass., 524, per Morton, J. And see *Dewey v. Moyer*, 72 N. Y., 70. A suit may be maintained by a judgment creditor to set aside a deed of real estate made by the debtor with intent to defraud the plaintiff, although the debt was created after the execution of the deed, the defendant remaining in possession of the land, and in seeming ownership, and keeping up his credit thereby. In such case, a transfer of real estate may be made with an intent to defraud one who has subsequently become a creditor; and the fact of fraudulent intent appearing, the deed will be declared void as against the subsequent creditor. *Shand v. Hanley*, 71 N. Y., 319. See *Savage v. Murphy*, 34 N. Y., 508; *Case v. Phelps*, 39 Ib., 164. A vendee, or his creditors, seeking to apply the property to the payment of their debts, cannot enforce specific performance of a contract for the sale of land which has been rescinded by the parties either in writing or by parol, even if the contract of rescission is not recorded. If the motive for the rescission of the contract was to benefit the vendee, or injure his creditors, the creditors would not be affected by it. Otherwise, if it was to save the vendor. *Fleming v. Martin*, 2 Head Tenn., 43. It was early held in New York, that a voluntary conveyance by one indebted at the time, was fraudulent toward his creditors as matter of law; and no evidence was admitted to rebut the presumption of fraud. *Reade v. Livingston*, 3 Johns Ch., 481. A less stringent rule was afterward adopted, that while a conveyance by a person indebted, was *prima facie* fraudulent, the presumption might be rebutted. *Seward v. Jackson*, 8 Cowen, 406. The presumption must, however, be overcome by circumstances showing, on their face, that there could have been no fraudulent intent, such as that the gift is a reasonable provision, and that the debtor still has sufficient means to pay his debts. *Carpenter v. Roe*, 10 N. Y., 230; *Babcock v. Eckler*, 24 Ib., 623; *Dygart v. Remerschnider*, 32 Ib., 648; *Curtis v. Fox*, 47 Ib., 300; *Cole v. Tyler*, 65 Ib., 73.

² Made perpetual by 39 Eliz., Ch. 18, Sec. 31.

the object of which was to protect subsequent purchasers from the grantor against volunteers under prior conveyances, a voluntary conveyance is void, as to a subsequent purchaser, notwithstanding the purchaser had notice of the voluntary conveyance, and it was *bona fide* and for a good consideration; the statute, in such case, inferring fraud, and not suffering the presumption to be gainsaid.¹ In the United States the construction of the statute is different; the courts holding that a subsequent sale, without notice, by a person who has made a voluntary settlement, is presumptive evidence of fraud, and throws upon the person claiming, under such voluntary settlement, the burden of proving that it was *bona fide*; and that a voluntary conveyance without fraud, is valid as against a subsequent purchaser for a valuable consideration who has notice of such voluntary conveyance.²

§ 343. *Fraudulent interference with public sale.*—When the sale is at auction, the employment of an under-bidder or puffer, will sometimes prevent the enforcement of the contract on the ground of fraud. If it be secretly arranged that a deceptive competition shall be got up, by the bidding of one or more persons employed for that purpose, by which *bona fide* bidders are misled, the sale will be held void as unconscientious and against public policy.³ At law,

¹ Doe v. Manning, 9 East, 59; Pulvertoft v. Pulvertoft, 18 Ves., 84; Buckle v. Mitchell, *ib.*, 100; Kelson v. Kelson, 10 Hare, 385; Daking v. Whimper, 26 Beav., 568; Clarke v. Wright, 6 H. & N., 849; Cotterell v. Homer, 13 Sim., 506.

² Sterry v. Arden, 1 Johns Ch., 261; S. C., 12 Johns, 536; Jackson v. Town, 4 Cowen, 603; Beal v. Warren, 2 Gray, 446; Cathcart v. Robinson, 5 Peters, 280; Lancaster v. Dolan, 1 Rawle, 31; Lyne v. Bank of Kentucky, 5 J. J. Marsh, 545; Corprew v. Arthur, 15 Ala., 525; Brown v. Bucks, 22 Ga., 574; Gardner v. Booth, 31 *ib.*, 136; Salmon v. Bennett, 1 Conn., 525; Enders v. Williams, 1 Metc., Ky., 346; Mayor & City Council of Balt. v. Williams, 6 Md., 235; Shaw v. Levy, 17 Serg. & R., 99; Aiken v. Bruen, 21 Ind., 137; Coppage v. Barnett, 34 Miss., 621; Footman v. Pendergrass, 3 Rich. Eq., 33; Wickes v. Clarke, 8 Paige Ch., 165. To constitute the defence of a *bona fide* purchase without notice, the purchaser must have paid in full before notice of the fraud of the vendor. Florence Sewing Machine Co. v. Zeigler, 58 Ala., 221. "We do not sanction the extreme doctrine that a purchaser, no matter how innocent he may be, acquires no rights against a latent equity until he pays in full and receives a conveyance. We hold that he acquires an equity *pro tanto* to the extent he pays before notice." *ib.*, per Stone, J.

³ 1 Fonbl. Eq., B. 1, Ch. 4, Sec. 4, note X; Veazie v. Williams, 8 How., 134;

all secret dealing on the part of the seller with a view to enhance the price of property put up for sale, is deemed fraudulent.¹ But in equity, subject to an exception presently to be mentioned, the vendor, without announcing his intention, may fix upon a price which he is willing to take for the property, and employ a person to bid for him up to that price;² though if he employ more than one person to bid, or if his object in employing a bidder is to enhance the price, the sale will be deemed fraudulent in equity, as well as at law.³ Ordinarily, however, the keeping back by the vendor of anything in relation to the sale, even though it be the employment of a single bidder to prevent a sacrifice of the property, has the appearance of unfairness toward competitors, and it is more proper for him to announce, previous to the sale, that unless the bidding reaches a certain limit, the property will be withdrawn.⁴ If it be an-

Jones v. Caswell, 3 Johns Cas., 29; Hamilton v. Hamilton, 2 Rich. Eq., 355; Brisbane v. Adams, 3 N. Y., 130; Woods v. Hall, 1 Dev. Eq., 411; Pennock's Appeal, 14 Pa. St., 449; Staines v. Shore, 16 Ib., 200; Slater v. Maxwell, 6 Wall, 268.

¹ Thornett v. Haines, 15 M. & W., 372; Crowder v. Austin, 3 Bing., 368.

² Flint v. Woodin, 9 Hare, 618. But see Woods v. Hall, 1 Dev. Eq., 415.

³ Connolly v. Parsons, 3 Ves., 625, *n.*; Meadows v. Tanner, 5 Mad., 34; Thornett v. Haines, *supra*; Bramley v. Alt, 3 Ves., 620; Wolfe v. Luyster, 1 Hall, 146.

⁴ In a sale at auction the vendor may stipulate for the power of buying the property if it is going at a sum below what he considers a fair price. But, in the absence of such stipulation, courts of law hold that it is a fraud in the vendor to prevent the property from going to the person who offers the highest price. It has been claimed that a different rule prevails in equity, and that, without any express stipulation, a vendor may always fix a reserved price, and authorize a person to bid for him so as to prevent the property from going under that price. Sir William Grant, in *Smith v. Clarke*, 12 Ves., 477, not only recognized, but apparently approved, of such a rule. He seemed to think it fair and just that persons putting up property for sale at auction, should be at liberty to employ a person to bid for them a stipulated price to prevent its being sold at an undervalue. The practice of courts of equity, in modern times, is to require an express stipulation for the right not to sell under a fixed price, and so, by implication, to employ a person to bid up to that price. See *Mortimer v. Bell*, L. R. 1, Ch. 12, 13; *Woodward v. Miller*, 2 Coll., 279. A mortgaged certain property to B., which was levied on by C. under an execution in his favor. A. agreed by parol with C. that C. should bid in the property at the amount of the execution, and give A. time to redeem it for the benefit of B. On a bill in equity to enforce this agreement, it was held that it was not within the statute of frauds, but that the sale could not be ratified, as other persons who were present at the sale were kept from bidding by their knowledge of this agreement. *Rose v. Bates*, 12 Mo., 30.

nounced that the sale will be without reserve, any interference by the vendor affecting the right of the highest bidder to have the property knocked down to him, will amount to fraud, and be a defence to a suit for specific performance.¹ Where the assignees of an insolvent put up for sale at auction, without reserve, his life interest in certain property under a secret arrangement with a person whose wife was interested in remainder, that he should bid thirty-five thousand pounds and take the property unless a higher sum should be bid, it was held that it tainted the sale to the defendant, though he bid off the property for fifty thousand pounds.² At an auction sale the conditions stated that property was to be struck off to the highest bidder, without saying anything as to bidding on behalf of the vendor. An agent of the vendor bid twenty-five hundred pounds. The auctioneer then bid twenty-six hundred pounds; and the agent and the auctioneer continued bidding against each other, until the biddings reached thirty-six hundred pounds. The defendant then bid thirty-six hundred and fifty pounds, and the property was knocked down to him. It was held, reversing the decision of the court below, that the vendor could not enforce the contract.³ If a person prevents another from bidding, in order to obtain the property at an under-value, it is fraudulent as against the seller.⁴ At an auction sale a bidder entered into an agreement with a by-stander that, if he would not bid against him, he would divide the land with him, and it was held a fraud on the vendor, and that equity would not enforce the contract against him.⁵ But it is

¹ Robinson v. Wall, 2 Phil., 375; Thornett v. Haines, *supra*; Meadows v. Tanner, 5 Mad., 34.

² Robinson v. Wall, *supra*. Where a person, employed by the owner of property sold at auction, as a puffer, runs up the price, and the property is knocked down to him, he will be entitled to hold it against his employer, who, having been a party to the fraudulent agreement, cannot avoid it. Troughton v. Johnston, 2 Hayw., 328. But a purchaser at such a sale will be entitled to have the contract set aside, on a bill filed for that purpose. Morehead v. Hunt, 1 Dev. Eq., 35. See Moncrief v. Goldsborough, 4 Har. & McHen., 280.

³ Mortimer v. Bell, L. R. 1, Ch. 10. ⁴ Cocks v. Izard, 7 Wall, 559.

⁵ Whitaker v. Bond, 63 N. C., 290.

doubtful whether a mere agreement between two persons not to bid against each other, and that one shall retire, will avoid the sale.¹

§ 344. *Combination of buyers at auction sale.*—Sales for taxes are not valid, unless conducted strictly according to law, and without anything being done to prevent free competition.² A partnership, or combination of individuals, formed for the express purpose of buying land at a sale for taxes, is a fraud on the owner of the property, and a conveyance thus obtained will be set aside.³ Under certain circumstances, persons may lawfully and properly unite in their biddings. As, where the whole property for any reason does not suit the individuals of the association, as costing more than one would wish to purchase; or where it consists of parts, some suitable for one and some for others of the association; or where the purchase might involve a risk which they, as individuals, are not willing to encounter—as a disputed title, or the like, or the case of a loss upon a resale, where the profits may be great, and so may the loss; or if the association acts from motives of humanity and benevolence toward some individual, whom they intend to benefit, and, by a joint bid, equalize the burden.⁴ On the same principle as an agreement not to bid at auction, an agreement, for a certain sum, not to compete with another for carrying the United States mail, is unlawful.⁵ Lien creditors, as well as others, may purchase jointly at a sheriff's sale, if all be open and fair. But a combination, not for the convenience of the parties in enabling them to cut up the property if it should be too much for one of them, or in putting their means together if the price should

¹ Galton v. Emuss, 1 Coll., 243; Matter of Carew's estate, 26 Beav., 187; Snell v. Jones, 6 Serg. & Rawle, 122; Phippen v. Stickney, 3 Metc., 384; Kerr on Fraud and Mistake. But see Story's Eq. Juris., Sec. 293; Jones v. Caswell, 3 Johns, Cas. 29; Doolin v. Ward, 6 Johns, 194; Wilbur v. Howe, 8 Ib., 444; Hawley v. Cramer, 4 Cowen, 717; Thompson v. Davis, 13 Johns, 112.

² Slater v. Maxwell, 6 Wall, 268.

³ Dudley v. Little, 2 Ohio, 504.

⁴ Smith v. Greenlee, 2 Dev., 126; Goode v. Hawkin, 2 Dev. Eq., 393; Sutger v. Skiles, 3 Gilman, 529; Kearney v. Taylor, 15 How., 494.

⁵ Gulick v. Bailey, 5 Halst., 87.

be too large, but to get the property at an under-value by hindering it from having a fair chance in the market, would be fraudulent. It is the end to be accomplished which makes such a combination lawful or otherwise. If it be to depress the price of the property by artifice, the purchase will be void. On the other hand, if it be to obtain the means of payment by contribution, or to divide the property for the accommodation of the purchasers, it will be valid.¹

§ 345. *Enjoining wrongful action at law.*—When a party, by fraud or mistake, has an advantage in proceeding at law, and which must necessarily make the court an instrument of injustice, a court of equity, to prevent a manifest wrong, will interpose by restraining the party whose conscience is thus barred from using the advantage he has improperly gained. On a bill to obtain a perpetual injunction against a suit at law on the covenants of a deed, it appeared that the property was conveyed with the usual covenants of seisin and warranty; that at the time of the conveyance, a railroad company had acquired a permanent easement on the premises for the track of their road, and for obtaining gravel and other materials for their use in its construction; that this right was known and understood by the grantee at the time of the conveyance, and the matter mutually settled and arranged in the appropriation between the grantor and grantee of specified portions of the damages to be paid by the railroad company. It was held that the complainant was entitled to the relief prayed, and the grantee was restrained from using the deed and its covenants as evidence to enforce his claim.²

¹ *Smull v. Jones*, 1 Watts & Serg., 128; *Phippen v. Stickney*, 3 Metc., 384. It is not unlawful for individuals to associate together for the purpose of purchasing lands of the United States at a public sale. It was formerly the practice of the government to sell large tracts of the public land to associated individuals at reduced prices. And arrangements are often made not to bid against an individual who may have settled on and improved the land he wishes to purchase. *Platt v. Oliver*, 1 McLean, 295.

² *Taylor v. Gilman*, 25 Vt., 411. In this case the court said: "The only ground upon which this testimony can be received to control the legal effect and

§ 346. *Right of party to rescind contract.*—When a person discovers that he has been defrauded into making an agreement, if he seeks to avoid the agreement on that ground, he must repudiate it and give back whatever he may have obtained under it.¹ If, upon the discovery of the fraud, he offer to return the property purchased, he will be entitled to rescind the contract, and to be restored to his former condition in all respects; and a mere want of diligence, without knowledge of the fraud, is not sufficient to deprive him of this right.² It will be no answer to the plaintiff's claim for rescission, that the defendant has done acts which prevent him from being restored to his original condition. Since the plaintiff may elect to sue for damages, or to take such imperfect reparation, by way of rescission, as the defendant can give, if he chooses the latter alternative the defendant has no reason to complain.³ There are *dicta* of judges which lay down the doctrine that

operation of these covenants, is the fraud of the party in attempting to enforce them in violation of his agreement. The evidence is regarded as sufficiently certain and clear, in the proof of that contract, that the damages to be paid by the railroad for their right in the premises were to be divided between these parties in specified proportions, and that no claim was to be made on the grantor on his covenant in this deed for any matter arising out of that negotiation; and evidently it was in confident reliance upon this understanding that the grantor neglected so to qualify his covenant that no right of action could arise thereon for that matter. Regarding these facts, therefore, as sufficiently proved, and the bill as sufficiently setting up the fraud and asking for relief on that ground, we think the case is brought within the general rule upon which relief is granted." A. procured his son to take possession of a quarter section of land for the purpose of acquiring a preemption right to the same under an agreement between them that A. should pay for the land after the right was acquired, and the son was to convey one-half of it to him. The son having secured the title, the court refused to enforce his contract, as the agreement was in contravention of the preemption laws. *Dial v. Hair*, 18 Ala., 798.

¹ *Arnold v. Nichols*, 64 N. Y., 117; *Eastman v. Plumer*, 46 N. H., 464.

² *Blair v. Bromley*, 5 Hare, 559; *Blennerhasset v. Day*, 2 B. & B., 129; *Eigelsberger v. Kibler*, 1 Hill Ch., 113; *Veazie v. Williams*, 8 How., 134; *Steele v. Kinkle*, 3 Ala., 352; *Wamburzee v. Kennedy*, 4 Dessaus Eq., 474; *Harrell v. Kelly*, 2 McCord, 426; *Pendleton v. Galloway*, 9 Ohio, 178; *Longworth v. Hunt*, 11 Ib., 194; *Huston v. Cantril*, 11 Leigh, 136; *Haywood v. Marsh*, 6 Yerg., 69. But see *Humbert v. Trinity Church*, 7 Paige Ch., 195; *S. C.*, 24 Wend., 587. A judgment creditor and debtor entered into an agreement that the latter should pay a judgment in land, the price to be fixed by persons designated. The debtor defeated the performance of the agreement until the land had risen in value, and it was held that he could not maintain a bill to compel specific performance. *Pillow v. Pillow*, 3 Humph., 644.

³ *Masson v. Bovet*, 1 Denio, 69; *Hammond v. Pennock*, 61 N. Y., 145.

"the rescission must be made after the party has had a reasonable opportunity to discover the fraud, and that vigilance and care must be exercised." But these cases must be considered in connection with the facts there presented, and do not establish any general rule applicable to all cases."³ The statute of limitations is not a bar to a suit in equity in case of fraud until knowledge of the fraud, or the means of knowledge, or such notice as to put the party injured on inquiry.³

§ 347. *Waiver of fraud.*—The party injured by the fraud may waive the objection by adopting the contract, and this may be done either by some positive act or by conduct showing acquiescence.⁴ As where the vendee, with full knowledge of every material fact, accepts a deed of the property;⁵ or the vendor ratifies the sale by bringing an action and recovering a judgment for the purchase money.⁶ But waiver imports and is founded on knowl-

¹ *Ross v. Tilterton*, 6 Ohio, 284; *Septon v. Fritlock*, 13 Alb. L. J., 27.

² *Baker v. Lever*, 67 N. Y., 304, per Miller, J.

³ *Sturgis v. Morse*, 24 Beav., 541; *Browne v. Cross*, 14 Ib., 106; *Parker v. Bloxam*, 20 Ib., 295; *Blennerhasset v. Day*, *supra*; *Salkeld v. Vernon*, 1 Eden, 64; *Trevelyan v. Charter*, 4 L. J. Ch., N. S., 229; *Savery v. King*, 5 House of Lds., 627; *Spackman's Case*, 34 L. J. Ch., 321, 326; *Stanhope's Case*, L. R. 1, Ch. 161; *Michaud v. Girod*, 4 How., 503; *Croft v. Arthur*, 3 Dessaus Eq., 223; *Tate v. Tate*, 1 Dev. & Batt. Eq., 22; *Phalen v. Clark*, 19 Conn., 421; *Parkham v. McCrary*, 6 Rich. Eq., 140; *McClure v. Ashby*, 7 Ib., 430; *Shannon v. White*, 6 Ib., 96; *Edmonds v. Goodwin*, 28 Ga., 38; *Buckner v. Calcote*, 28 Miss., 432; *Munson v. Hallowell*, 27 Texas, 457. "If the property is of a speculative or precarious nature, it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage. Parties who are in the situation of shareholders in companies must, if they come to the court to be released from their shares on the ground of fraud, come with the utmost diligence and promptitude. The question of delay may also be materially affected by reference to the relation which subsists between the parties. If, for instance, the transaction is between solicitor and client, a delay which would be fatal in other cases may be permitted; for the solicitor must know that the *onus* of supporting the transaction will rest on him, and that if he desire it to be upheld he must preserve the evidence which will be required to uphold it." *Kerr on Fraud and Mistake*, 306, 307.

⁴ *Attwood v. Small*, 6 Cl. & Fin., 432; *MacBryde v. Weekes*, 22 Beav., 533; *Moffat v. Winslow*, 7 Paige Ch., 124; *Crozier v. Acher*, Ib., 137; *Dougherty v. Dougherty*, 3 Halst. Ch., 627; *Crawley v. Timberlake*, 2 Ired. Eq., 460.

⁵ *Vernol v. Vernol*, 63 N. Y., 45.

⁶ *Sanger v. Wood*, 3 Johns Ch., 416; *Nelson v. Carrington*, 4 Munf., 332; *Pettus v. Smith*, 4 Rich. Eq., 197. A person will not be permitted first wilfully

edge of the thing alleged to have been waived. Where, in an action by a creditor to set aside a conveyance of land made by the defendant to his wife in fraud of his creditors, it appeared that the plaintiff knew of the transaction at the time and did not object to it, but there was no evidence that the plaintiff knew that the defendant thereby deprived himself of the means of paying his debts, it was held that the plaintiff was not estopped from questioning the conveyance as fraudulent.¹ The representatives of a person who has acquiesced in a transaction occupy no better position than the person himself.²

§ 348. *Right of party in case of mistake.*—Mistake, by which in this connection is meant an erroneous conviction, under which a person either does, or omits to do, something which he would not otherwise have done or omitted,³ may relate to matter of law or to matter of fact, and be, 1st, by the defendant alone; 2d, by both plaintiff and defendant; or 3d, by the plaintiff alone. As the second and third raise the question as to how far the plaintiff may enforce performance with a correction of the error, mistake will have to be considered not only as a defence to a suit for specific performance, but also as entitling the plaintiff to a rescission or correction of the contract. A mistake of both parties avoids the contract at law, and equity will rescind a contract entered into under such circumstances. So, if a party, at the time of making a contract, has been led

to repudiate the obligation of a contract, and then turn round and ask a court of equity specifically to enforce it. *McClellan v. Darrah*, 50 Ill., 249.

¹ *Cole v. Tyler*, 65 N. Y., 73.

² *Walmesley v. Booth*, 2 Atk., 25; *Bellew v. Russell*, 1 B. & B., 96.

³ *Haynes' Outlines of Equity*, 132; *Jeremy, Eq. Juris.*, B. 3, Pt. 2, p. 358. Mr. Kerr (*Tr. on Fraud and Mistake*, p. 396) defines Mistake thus: "Some unintentional act, omission, or error, arising from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence." Ignorance implies a total want of knowledge in reference to the subject matter. Mistake admits a knowledge, but implies a wrong conclusion. Where one is misled by the advice of another, he may refer his mistake to the suggestions which prompted his action. But ignorance concedes the want of all knowledge; and action under it proceeds from a person's own will not influenced by the counsel of another. See *Hutton v. Edgerton*, 6 S. C., 485.

into a mistake, the contract will not be specifically enforced against him; the advantage which a party who has full knowledge over the other, who is but partially informed, making an agreement appear too unfair to admit of the aid of a court of equity.¹

§ 349. *Nature of objection in case of mistake.*—The principle upon which mistake is allowed as a defence is, that where there is a mistake there is not that consent which is essential to a contract in equity. Moreover, the statute of frauds leaves it open to the defendant to produce evidence to rebut an equity which the plaintiff claims has arisen out of an agreement.² It has been argued that the admission of parol evidence to show mistake in a written agreement, either as a defence to a suit for specific performance, or for the purpose of correcting the mistake, contravenes the statute of frauds. But “it cannot be said that because the legal import of a written agreement cannot be varied by parol evidence intended to give it another sense, therefore, in equity, when once the court is in possession of the legal sense, there is nothing more to inquire into. All the doctrine of the court as to cases of unconscionable agreements, hard agreements, agreements entered into by mistake or surprise, which the court will not execute, must be struck out, if it is true that because parol evidence

¹ Mason v. Armitage, 13 Ves., 25.

² Peterson v. Grover, 20 Me., 363. A mistake may be shown by parol, and relief be granted to the injured party, whether he sets up the mistake affirmatively by bill or as a defence. Rogers v. Atkinson, 1 Kelly, 12. “The English courts have repeatedly expressed a strong inclination not to decide in favor of plaintiffs seeking, not to set aside the agreement, but to enforce it, when it is reformed, by parol evidence. They affirm that the difference of right and condition as to the plaintiff and defendant, relating to evidence offered for the purpose of obtaining a decree or resisting it, exists in the code of every civilized nation. The ground of the distinction is this: when a party has entered into a written agreement, and seeks as plaintiff a specific performance of it, he must rely on the agreement as it stands. He can neither add to, vary, nor explain any of its terms by parol proof. If he cannot enforce the true contract, he still retains all he was ever in possession of. He may suffer disappointment, which, as the consequence of his want of caution and explicitness, he must bear. But not so with the defendant. He might encounter not disappointment only, but sustain ruinous loss, if compelled specifically to execute an agreement different from that which he contemplated.” Ibid., per Lumpkin, J. See Bellows v. Stone, 14 N. H., 175.

should not be admitted at law, therefore it shall not be admitted in equity upon the question whether, admitting the agreement to be such as at law it is said to be, the party shall have a specific execution, or be left to that court in which it is admitted parol evidence cannot be introduced.”¹ “No person shall be charged with the execution of an agreement who has not, either by himself or his agent, signed a written agreement; but the statute does not say that if a written agreement is signed, the same exception shall not hold to it that did before the statute.”²

§ 350. *Rule where there is a mistake as to the law.*—A mistake of the law will not in general be a ground for resisting the specific performance of an agreement, nor for setting aside a contract fairly entered into with full knowledge of the facts.³ The distinction between mistakes of law and fact as a foundation for equitable relief seems to be one of expediency and policy, to guard against the fraud and injustice to which the parties would otherwise be exposed. Where relief has been sought solely on account of a mistake of law, there has seldom been a departure from the rule that mistake of law will not affect the contracts of parties, or excuse them from the legal consequences of their acts.

¹ Lord Eldon in *Marquis Townshend v. Stangroom*, 6 Ves., 328.

² Lord Redesdale in *Clinan v. Cooke*, 1 Sch. & Lef., 39.

³ *Marshall v. Collett*, 1 Y. & C. Ex., 232, 238; *Cockerell v. Cholmeley*, 1 R. & My., 418; *Pullen v. Ready*, 2 Atk., 587; *Gibbons v. Gaunt*, 4 Ves., 489; *Stockley v. Stockley*, 1 V. & B., 23, 30; *Mildmay v. Hungerford*, 2 Vern., 243; *Mellers v. Duke of Devonshire*, 16 Beav., 257; *Teed v. Johnson*, 25 L. J. Exch., 110; *Midland Gt. Western Co. of Ireland v. Johnson*, 6 House of Lds., 798; *Bank of U. S. v. Daniel*, 12 Pet., 32; *Wooden v. Haviland*, 18 Conn., 101; *Heilbron v. Bissell*, 1 Bailey Ch., 430; *Lyon v. Richmond*, 2 Johns Ch., 60; *Storrs v. Barker*, 6 Ib., 166; *Dow v. Ker*, *Spear Ch.*, 413; *Wintermute v. Snyder*, 2 Green Ch., 489; *Bell v. Steele*, 2 Humph., 148; *Trigg v. Read*, 5 Ib., 529; *Shotwell v. Murray*, 1 Johns Ch., 512; *Gunter v. Thomas*, 1 Ired. Eq., 195; *Brown v. Armistead*, 6 Rand, 594; *State v. Reigart*, 1 Gill, 1; *Shafer v. Davis*, 13 Ill., 395; *Dill v. Shahan*, 35 Ala., 694; *Gwynn v. Hamilton*, 29 Ib., 233; *Peters v. Florence*, 38 Pa. St., 194; *Smith v. McDougal*, 2 Cal., 586; *McMurray v. St. Louis, etc., Co.*, 33 Mo., 377. Although a mistake as to the law of a foreign State is considered a mistake of fact in most cases, yet, when a non-resident enters into a contract to be performed in another State, or relating to lands in a foreign State, he is held to know the law of such State, and, in that case, the mistake is one of law. *Bentley v. Whittemore*, 18 N. J. Eq., 366.

§ 351. *Mistake as to legal effect of written instrument.*—When persons make just such an agreement as they design to make, without fraud, surprise, undue influence, or mistake of their rights, but they are mistaken as to the mere legal effect of the writing, that alone will not be a ground for the interference of a court of equity. Nor, as a general rule, is parol evidence admissible to supply omissions, vary the legal construction, or explain the intention.¹ Evidence is therefore not admissible to show that the legal result of an agreement is different from what the parties supposed it would be. There is in such a case, nothing for equity to lay hold of. The parties have made their own contract, and a court of equity cannot change it. Thus, if in an agreement for the purchase of land, it was stipulated that the vendor should make certain warranties, a mistake as to the legal consequences of such warranties would not authorize

¹ *Cave v. Holford*, 3 Ves., 650; *Pole v. Lord Somers*, 6 Ib., 309; *Martin v. Drinkwater*, 2 Beav., 215; *Powell v. Smith*, L. R. 14, Eq. 85; *Lyon v. Richmond*, 3 Johns Ch., 60; *Jackson v. Kniffen*, 2 Johns, 31; *Jackson v. Sill*, 11 Ib., 201; *Webb v. Rice*, 6 Hill, 219; *Farrer v. Ayres*, 5 Pick., 404; *Dupre v. Thompson*, 4 Paige Ch., 279; *Adams v. Winne*, 7 Ib., 99; *Irving v. Dekay*, 9 Ib., 528; *Weston v. Foster*, 7 Metc., 297; *Mellish v. Robertson*, 25 Vt., 603; *Good v. Herr*, 7 Watts & Serg., 253; *Ruffner v. McConnel*, 17 Ill., 212; *Wood v. Price*, 46 Ib., 437; *Martin v. Hamlin*, 18 Mich., 354; *Garwood v. Eldridge*, 1 Green Ch., 145; *Hawralty v. Warren*, 18 N. J. Eq., 124; *Arthur v. Arthur*, 10 Barb., 9; *Gavin v. Murphy*, 25 Minn., 142; 1 Phil. Ev., 548; *Story's Eq. Juris.*, Secs. 113 to 127, 1531. Where in a contract for the sale of real estate, there was no fraud or mistake in point of fact, as the complainant got the land which was pointed out to him as the land to be sold, but the claim of the complainant was based upon the ground that the words of the agreement, because of a general expression, by their correct and legal construction, entitled the complainant to a conveyance of more land than the defendant understood he was selling, or than the complainant understood he was buying, the court declined to compel a conveyance of additional land, but left the complainant to his remedy at law. *Conover v. Wardell*, 20 N. J. Eq., 266. The chancellor said: "Relief is asked in a case where the complainant has got the precise land he bargained for, by the very lines pointed out to him, and by the precise lines designated in the written contract, because a general expression (homestead farm), used in the written contract as synonymous with this description, may be construed to mean more, by certain artificial rules of legal construction. If one should sell to another a city lot of twenty-five feet by one hundred, which both had inspected and agreed upon, and in the contract should agree to convey the land conveyed to him by A. B., instead of land conveyed by A. B., and should describe it by metes and bounds as a lot twenty-five by one hundred feet, if it turned out that the tract conveyed by A. B. contained twenty acres, the purchaser could hardly prevail upon a court of equity to order a conveyance of the twenty acres for the price of one lot, but would leave the complainant to his remedy at law."

an application to a court of equity for relief, however clearly the mistake was made out. Where A. enters into a contract with B. for the sale of property to him, and, in the same instrument, B. agrees to sell property to A., it cannot be proved by parol that these agreements, which in law are independent, were meant by the parties to be dependent.¹ So, where the effect of an agreement is to give an option to a lessee as to the duration of a term, it cannot be shown that this was not intended by the parties.² Because a party chooses to speculate upon facts, and the event is different from what he anticipated, his mistake will not be a ground for relief.³ A purchaser of land who accepts a deed without covenants, cannot have recourse against his grantor for a subsequently discovered incumbrance or defect in the title upon showing that under his contract of purchase he might have insisted on a deed with covenants, and that he believed the title clear when he accepted one without covenants.⁴ A husband made his will leaving certain land to his wife, but afterward exchanged this land for land owned by H., the wife joining in the deed to H., upon the assurance of the draftsman, given to her and her husband, that it would make no difference, but that she would be entitled under the will to the land received by her husband in exchange; and both relied upon this exposition of the law. The husband having died without leaving any real estate except the land conveyed to him by H., a bill in equity filed by the widow against the heirs at law praying that she might be declared entitled under the will to all the land of which the testator died seized, was dismissed with costs, the court holding that as there was purely a mistake of law, it could not be corrected.⁵ A., a widow, and her adult children, brought a suit against the infant heirs, for the sale of the

¹ Croome v. Lediard, 2 My. & K., 251.

² Price v. Dyer, 17 Ves., 356.

³ Harris v. Lloyd, 5 M. & W., 432.

⁴ Whittemore v. Farrington, 76 N. Y., 452; S. C., 12 Hun., 349. See Moran v. McLarty, 75 N. Y., 25; S. C., 11 Hun., 66.

⁵ Gilbert v. Gilbert, 9 Barb., 532.

land, one-half of which she claimed she owned, and that the balance belonged to the other parties to the suit. A decree for the sale having been rendered, the land was sold and conveyed to B. Afterward A. filed a bill of review, claiming that under the deed of the land to her and her deceased husband, she was entitled to the whole of the land, and praying that the sale might be set aside, and the land be reconveyed to her. It was, however, held that as the mistake of A. was one of law, the bill must be dismissed.¹ A father, being of advanced age, with a view to a final disposition of his property, proposed to his son that he should buy a farm belonging to the father, of the value of four thousand dollars, for which the son should give him two promissory notes, one for two thousand dollars, payable on demand with six per cent. interest, and the other for two thousand dollars, with five per cent. interest, payable at the death of the father, when it was to be given back to the son as his share of his father's estate. The son having accepted the proposition, the parties employed a magistrate to draw the necessary legal instruments; but owing to their not explaining to him their agreement, he by mistake drew the last mentioned note so as to make it fall due in three years, without stating that it was to be surrendered to the son at the death of his father, and the note was signed by the son in ignorance of its legal effect. An action having been brought by the father on the note, a bill in equity filed by the son to enjoin such action, was dismissed, and a motion for a new trial afterward denied.² Where the purchaser of an equity of redemption pays off the mortgage, and causes it to be discharged of record, he supposing that his title is good, he cannot, upon discovering his mistake, have the cancellation of the mortgage set aside, on the ground that but for his misapprehension, he would have taken an assignment of the mortgage to protect his title.³

¹ Zollman v. Moore, 21 Gratt., 313. ² Wheaton v. Wheaton, 9 Conn., 96.

³ ² Bentley v. Whittemore, 18 N. J. Eq., 366. In Hunt v. Rousmanier's Admrs., 8 Wheat., 174, the bill alleged that the plaintiff loaned to the defendants' inter-

§ 352. *Where, by mistake of law, writing does not express what was intended.*—If, however, in consequence of a mistake of the law, the written instrument does not embrace the agreement of the parties as they understood and intended, a court of equity will refuse to specifically enforce the contract, but will decree its reformation.¹ Thus, if, in the case of the warranties before stated, the deed was drawn by one party, and accepted by the other under the impression that the language of the instrument was sufficient to create the warranties stipulated, when the terms used were

tate a sum of money for which the latter gave his two promissory notes, and, as collateral security, a power of attorney authorizing the plaintiff to execute a bill of sale of two vessels to himself or any other person, and, in case of loss, to collect the amount for which said vessels were insured; that the intestate died insolvent, having paid only a small amount on said notes; that the plaintiff gave notice of his claim, took possession of the vessels on their arrival in port, and advertised the intestate's interest in them for sale, which sale was forbidden by the respondents, and this suit brought to compel them to join in the sale. An amended bill further alleged that it was agreed between the parties that Rousmanier was to give a special security on the vessels, and offered to give a mortgage; that, by advice of counsel, the power of attorney was taken in preference to a mortgage; and that the power of attorney was accordingly executed in the full belief that it would, and with the intention that it should, give to the plaintiff as full and perfect security as would be given by a mortgage. A demurrer to this bill was sustained by the circuit court. But, on appeal to the supreme court, the decision of the circuit court was reversed. Marshall, C. J., said: "In this case, the fact of mistake is placed beyond any controversy. It is averred in the bill, and admitted by the demurrer, that the powers of attorney were given by the said Rousmanier and received by the said Hunt under the belief that they were, and with the intention that they should create, a specific lien and security on said vessels. We find no case which we think precisely in point, and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief." The case having, however, again come before the supreme court (1 Pet., 1), the decree of the circuit court was affirmed. Washington, J., in delivering the opinion of the latter court, said: "The question then is, ought the court to grant the relief which is asked for, upon the ground of mistake arising from any ignorance of law? We hold the general rule to be, that a mistake of this character is not a ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something very peculiar in their characters." Where an executor, acting on his own unbiased judgment, bought lands belonging to the estate at a public sale made by him and his co-executors, under the mistaken supposition that the will of the testator conferred authority on them to sell the real estate, it was held that a court of equity would not relieve him of his purchase. *Dill v. Shahan*, 25 Ala., 694.

¹ *Joynes v. Statham*, 3 Atk., 388; *Garrard v. Grinling*, 2 Swanst., 244; *Clarke v. Grant*, 14 Ves., 519; *Martin v. Pycroft*, 2 De G. M. & G., 785; *Gordon v. Marquis of Hertford*, 2 Mad., 106; *Fallon v. Robins*, 16 Ir. Ch., 428; *Bradbury v. White*, 4 Me., 391; *Voorhees v. De Meyer*, 2 Barb., 37. See *Pettes v. Bank of Whitehall*, 17 Vt., 435; *Beardsley v. Knight*, 10 Vt., 185.

not in law sufficient for that purpose, equity would in that case reform the deed so as to express the true agreement.¹ Where a bond was executed by one of several partners, all of the members of the firm intending that the bond should bind them, under a mistake of both parties as to the legal effect of the execution of the bond, and its operation to discharge all but the partner who executed it, and he was insolvent, it was held that the obligee was entitled to relief in equity.²

§ 353. *Misstating law in settlement of differences.*—A mistake in law is not a cause for setting aside a compromise, entered into to avoid or terminate a litigation, where the parties have equal means of knowledge, and there is no fraud or misrepresentation or undue influence ;³ and it

¹ Larkins v. Biddle, 21 Ala., 252.

² McNaughten v. Partridge, 11 Ohio, 223. In this case Wood, J., said : " I do not know that I am authorized by a majority of my brethren to say a mere mistake of law may be corrected. But I am authorized to say that relief might be granted in the case at bar, if it depended on the case of mistake made in the bill. The inquiry then is, what is the mistake averred in the bill and admitted by the demurrer? Is it of law or fact? The bond given by Hall was precisely such as was agreed to be given. It was executed in the manner it was agreed to be executed. It contained every stipulation the parties supposed it contained. But they were mistaken in its legal effect. . . . Its operation was to discharge H. and R. Partridge, and charge only Hall, who was insolvent, with the debt. This neither the complainants nor the respondents designed. Is it not then manifest that it was sheer mistake of law; and may not such, in certain cases, afford ground for relief in equity? By two of the judges of this court relief was granted in a case by no means dissimilar, on the circuit in Cuyahoga County, at the last term. I cite from memory only, as I have with me no note of that case. Cushing had been negotiating with Clark, Hilliard, and Clark, for the purchase of two lots of ground. He concluded not to complete the contract. The parties had proceeded so far that two blank contracts had been filled up, but not signed by Cushing. In this situation, Hall applied to purchase the two lots; and, to avoid trouble and expense, it was agreed Cushing should sign the contracts, and assign them over to Hall, one of the vendors saying that Cushing would not be liable upon it for the purchase money, and Cushing being advised to the same import by others. Hall failed to make payment, and the vendors threatening to enforce the collection of Cushing, the contracts were declared void as against him. In Muskingum county, at the last term, a bill was pending to enforce the collection of interest upon a mortgage, and a mistake of law was set up, by way of defence, that it was understood between the parties by the terms employed, that if the mortgagor paid the principal punctually, the interest was not in law demandable; and the court refused a decree to the complainant, the principal having been punctually paid."

³ Gordon v. Gordon, 3 Swanst., 463; Stapilton v. Stapilton, 1 Atk., 2; Stewart v. Stewart, 6 Cl. & Fin., 969; Lawton v. Campion, 18 Beav., 87; Brooke v. Lord Mostyn, 2 De G. J. & S., 373.

makes no difference that only one of the parties has in fact any claim, and that the question was not in reality doubtful, if the parties themselves considered it doubtful.¹ But it is otherwise when a person, through want of knowledge of a plain and settled principle of law, is imposed upon, and, under the pretence of a compromise, made to surrender his property to another.²

§ 354. *Taking advantage of another's misapprehension of the law.*—If the mistake of law was induced and encouraged by the other party, or if, though he did not induce or encourage it, he took advantage of it, it will constitute a defence to a suit for specific performance.³ This was held in the following case: Cathcart had agreed to purchase of Robinson premises worth five thousand dollars for eight thousand dollars, for which Cathcart was to give his bonds payable at future days. The contract was drawn in the form of an agreement or covenant, and concluded with a penalty of one thousand dollars, in which each bound himself to the other. It was proved that Cathcart refused to execute the agreement if the penalty was any higher, on the ground that he might find it for his advantage to forfeit the contract and pay the penalty; and he explained to Robinson at the time circumstances which might induce him to pursue that course. The penalty was fixed at one thousand dollars, with the understanding, by Cathcart, that he could get rid of the agreement by paying that sum; and Robinson permitted him to execute the agreement under that belief.⁴ Although where a widow elects to take under

¹ *Lucy ex parte*, 4 De G. M. & G., 356. See *Wheeler v. Smith*, 9 How., 55.

² *Naylor v. Winch*, 1 Sim. & Stu., 555; *Jones v. Munroe*, 32 Ga., 181.

³ *Broughton v. Hutt*, 3 De G. & J., 501; *Ramsden v. Hylton*, 2 Ves. Sen., 304; *Pusey v. Desbouvrie*, 3 P. Wms., 315; *Skillman v. Teeple*, Saxton, 232; *Sparks v. White*, 7 Humph., 86; *Drew v. Clarke*, Cooke (Tenn.), 374.

⁴ *Cathcart v. Robinson*, 5 Pet., 264. In this case Chief Justice Marshall, after stating the facts, said: "Mr. Robinson, without hinting that the object would not be obtained by the condition, assented to it, and the agreement was signed. If this be a correct view of the transaction, it is not simply an instrument executed by a person who mistakes its legal effect, as it would have been had it been prepared with a penalty of one thousand dollars, and silently executed by Cathcart with full conviction that it left him the option to perform the contract

the will in ignorance of her rights she will be estopped from claiming dower, if the error is her own, and no imposition has been practiced, or fraudulent advantage taken; yet, if a widow, who is acquainted with all the facts, but is wholly unaware that by law she has a right of dower, is induced, by one who knows the law, and at the same time knows her ignorance of it, to release or assign her dower for a totally inadequate consideration, she will be entitled to relief.¹

§ 355. *When ignorance of law a ground for relief.*—With reference to ignorance of the law, as distinguished from mistake of the law, when the legal principle is confessedly doubtful, and one about which ignorance may well be supposed to exist, a person acting under a misapprehension of the law may be relieved in equity.² So, ignorance of law may be one of the ingredients of fraud on which the court will act. For when there is gross ignorance, or a palpable mistake on a plain and familiar principle of law,

or to pay the penalty. It is something more. The assent of Mr. Robinson to this reduction of the penalty, when demanded, avowedly for the purpose of enabling Mr. Cathcart to terminate his obligation by paying it, is doing something active on his part to give effect to the mistake and turn it to his advantage. It is in some measure co-operating with Mr. Cathcart in the imposition he was practicing on himself." After remarking that the case was not as strong as it would have been had Robinson suggested that the legal effect was as Cathcart supposed, the Chief Justice proceeded: "No untruth has been suggested. But if Mr. Robinson knew that Mr. Cathcart was mistaken, knew that he was entering into obligations much more onerous than he intended, that gentleman is not entirely exempt from imputations of suppressing the truth." But the silence of Robinson, when he knew the legal effect of the agreement, was not alone relied upon by the court in refusing to decree specific performance. It also took into consideration the inequality between the price and the value of the land. Whether the court would have refused to interfere if the agreement had rested on a mutual mistake without the circumstances of fraud, does not appear.

¹ *Light v. Light*, 21 Pa. St., 407. Where a widow elected to take her dower instead of a legacy in lieu thereof, under a mistake as to her rights, it was held that the election might be revoked, unless the situation had so changed since her election that it could not be done without prejudice to the subsequent acquired rights of others. *Macknet v. Macknet*, 29 N. J. Eq., 54.

² *Lammot v. Bowly*, 6 Har. & Johns, 500; *Garner v. Garner*, 2 Dessaus Eq., 437; *Mortimer v. Pritchard*, 1 Bailey Ch., 505; *Lowndes v. Chisholm*, 2 McCord Ch., 435; *Champlin v. Laytin*, 10 Wend., 407; S. C., 1 Edw. Ch., 467; 6 Paige Ch., 189; *Reservoir Co. v. Chase*, 14 Conn., 123; *Hudon v. Ware*, 15 Ala., 149; *Moreland v. Atchinson*, 19 Texas, 303; *Cooke v. Nathan*, 16 Barb., 342; *Cumberland Coal Co. v. Sherman*, 20 Md., 117; *Green v. Morris, etc.*, R.R. Co., 12 N. J. Eq., 165.

it may well give rise to a presumption, with admixture of other and even slight circumstances, that there has been undue influence, imposition, mental imbecility, surprise, or that the confidence of the party has been abused.¹ The second of four brothers died, and the youngest and eldest both claimed his estate. They referred the question to a schoolmaster, who decided that the youngest was entitled to the property, because lands could not ascend. Upon this the parties agreed to divide the estate between them, and the eldest brother executed a release. The chancellor decreed that the deed should be delivered up, "being obtained by mistake and misrepresentation."²

¹ Rankin v. Mortimore, 7 Watts, 372. In a suit for the specific performance of a contract for the sale of twenty-five thousand dollars' worth of personal property and a quarry, the whole valued at more than fifty thousand dollars, in which it was stipulated that five thousand dollars of the purchase money should be paid down, and a mortgage given to secure the balance, it appearing that both parties resided in another State, and that the vendor entered into the agreement under the mistaken belief that a chattel mortgage was valid without a retention of possession of the property by him, and that the vendee was insolvent, the bill was dismissed, the court remarking that it was the right and duty of the vendor to refuse to execute the agreement upon discovering the mistake. Patterson v. Bloomer, 35 Conn., 57.

² Lansdowne v. Lansdowne, Mosely, 364. In Champlin v. Laytin, 18 Wend., 407, Bronson, J., commented on the foregoing case as follows: "The facts are so briefly stated that it is impossible to say with certainty on what ground the decision proceeded. If there was any intentional misrepresentation, either about the facts or the law of the case, that would be a proper ground for affording relief; and it is stated in a report of the case (2 Jac. & Walk., 205) that the complainant alleged in his bill that he had been surprised and imposed upon by his brother and the schoolmaster. In the report by Mosely, Lord Chancellor King is made to say that the maxim of law, *ignorantia juris non excusat*, was in regard to the public; that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases. Mosely is not a book of very high authority; and I think it much more probable that the case turned on the ground of surprise and imposition than that the chancellor made use of the language imputed to him. Unless the case of Mosely is an exception, I think there is no one in the English books which affirms the doctrine that mere mistake in matter of law, in the absence of all fraud, surprise, circumvention, and undue influence, furnishes sufficient ground for setting aside a contract, or otherwise relieving a party from the legal consequences of his acts." In the same case (6 Paige Ch., 189), M'Coun, V. C., said: "I think these English cases are sufficient to establish the correctness of the position that a contract entered into under a mutual misconception of legal rights, amounting to a mistake of law in both contracting parties, by which the object and end of their contract, according to its intent and meaning, cannot be accomplished, is as liable to be set aside or rescinded as a contract founded on mistake of matters of fact; and that the court has the same power to grant relief in the first case as in the last." On appeal, the chancellor dissented from the foregoing proposition, and added: "If any relief can be had in such a case, it must be upon the ground of a distinction between

§ 356. *Compromise not affected by legal decision.*—A subsequent decision of a higher court in another case, giving a different exposition of a point of law from the one declared and known when a settlement between the parties takes place, cannot have a retrospective effect and overturn such settlement.¹

§ 357. *Misapprehension of both law and fact.*—Where there is a mistake of fact as well as of law, there is an exception to the rule that equity cannot relieve in cases of mere ignorance or mistake of law. Thus, where administrators gave their bond for a debt which their intestate, a trustee, did not owe, and was not authorized to pay, and

an actual mistake proved to have occurred, as in the case of *Lawrence v. Beaubien*, 2 Bailey, 623, and a mere ignorance of the law which was applicable to the facts of the case as known to both parties. And it must also be where, as in that case, the party seeking such relief acquired no beneficial interest by the contract, and where the adverse party has parted with nothing which was of any real value." A court of equity will not render a decree reforming a contract founded upon the complainant's ignorance of the existence of a statute where the allegation of ignorance is put in issue by the answer. There are no means of proving a party's ignorance of the existence of a statutory provision. A case might occur in which a person could prove that he acted under a mistake of law; and courts have sometimes granted relief in such cases where it could be done without impairing the rights of those who were not aware of the existence of such mistake when their rights accrued. *Hall v. Reed*, 2 Barb. Ch., 500. In *Lawrence v. Beaubien*, 2 Bailey, 623, Johnson, J., who delivered the opinion of the court, makes a distinction between mere ignorance of the law, which is incapable of proof, and a mistake of law, which can be established by evidence. He says the former is passive, and does not presume to reason; and unless we are permitted to dive into the secret recesses of the heart, its presence is incapable of proof. But the latter supplies palpable evidence of its existence. In the New York court of errors, in *Champlin v. Laytin*, 18 Wend., 423, Paige, Senator, adopted this distinction.

¹ *Lyon v. Richmond*, 2 Johns Ch., 51. Reversed in error, 14 Johns, 501, on other grounds. "The courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. And to permit a subsequent judicial decision in any given case, on a point of law, to open or annul everything that has been done in other cases of the like kind for years before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of society, there is no such pernicious precedent to be found. The case, therefore, is to be decided according to the existing state of things when the settlement in question took place." Kent, Ch., in *Lyon v. Richmond*, *supra*. "The principles of the common law have been followed more closely in this State (New York), than they have in some of the other States, and our courts have never held but one language on this question." Bronson, J., in *Champlin v. Laytin*, 18 Wend., 407; referring to the general rule in relation to mistake of law.

they were not trustees in law or fact, and were not authorized to pay, and did not themselves owe the debt, but gave the bond in mistake of their rights, it was held that the bond was relievable against in equity.¹

§ 358. *Mistake of fact must not be fault of party complaining of it.*—The mistake most frequently alleged as a ground for equitable relief, and the one in which the jurisdiction is liberally exercised to prevent injustice, is mistake in matter of fact, which is free from the inconveniences, embarrassments, and objections appertaining to mistake in matter of law.² Fraud implies misconception or mistake in the party defrauded, with the additional circumstance that the other party intentionally causes the mistake.³ No general rule can be laid down as to what kind or degree of mistake is relievable in equity. But it must not be owing to a want of reasonable diligence;⁴ it being the policy of courts to administer relief only to the vigilant, and not where the mistake is imputable to the party's own improvidence and inattention.⁵ The rule that he who seeks equity must do equity, does not make one who has committed an error responsible for all the remote and possible consequences which may arise out of its leading others to com-

¹ Gross v. Leber, 47 Pa. St., 520. If a court of equity "can relieve against a mistake in law in any case where the defendant has been guilty of no fraud or unfair practice, which is at least very doubtful, it must be in a case in which the defendant has in reality lost nothing whatever by the mistake, and where the parties can be restored to the same situation substantially, in which they were at the time the mistake happened." Walworth, Chancellor, in Crosier v. Acer, 7 Paige Ch., 137. Where a man, through the mistake of his counsel, in whom he had confidence, gave his note for more than he was legally bound, it was held that he was relievable in equity. Fitzgerald v. Peck, 4 Litt., 125.

² Jenks v. Fritz, 7 Watts & Serg., 201; Merchants' Bank v. McIntyre, 2 Sandf., 431; Ketchum v. Catlin, 21 Vt., 191.

³ Leake on Contracts, 182.

⁴ Duke of Beaufort v. Neeld, 12 Cl. & Fin., 248, 286; Wild v. Hillas, 18 L. J. Ch., 170; Leuty v. Hillas, 2 De G. & J., 110; Jouzin v. Toulmin, 9 Ala., 662; Lamb v. Harris, 8 Ga., 546; Daniel v. Mitchell, 1 Story, 172; Warner v. Daniels, 1 Woodb. & Minot, 90; Ferson v. Sanger, Ib., 138; Western R.R. Co. v. Rabcock, 6 Metc., 346; Hill v. Bush, 19 Ark., 522; Diman v. Providence, etc., R.R. Co., 5 R. I., 130; Capehart v. Moon, 3 Jones Eq., 178; Taylor v. Fleet, 4 Barb., 95; Penny v. Martin, 4 Johns Ch., 566; Kite v. Lumpkin, 40 Ga., 506.

⁵ Wood v. Patterson, 4 Md. Ch., 335; Custard v. Custard, 25 Texas, 49.

mit errors by placing confidence in its accuracy, instead of examining for themselves. That would make a person responsible not only for the consequences of his own errors, but for the negligence of others.¹ Where a party sought to be released from his purchase at an execution sale, on the ground that not having heard the terms of sale, or ever before attended such a sale, he supposed that the amount of a mortgage on the property would be deducted from his bid, it was held that as the mistake had arisen from his own negligence, he was not entitled to relief.²

§ 359. *Kind of mistake which will be relieved against.*—Mistake to be a cause for the interference of a court of equity must be material; that is, of the essence of the transaction, and without which it is not probable the transaction would have taken place.³ Where both parties were mistaken as to the duration of a leasehold interest, so that the price was very much less than it would have been if the extent of the interest had been known, and the vendors brought a suit for the reassignment of the extra term, it was held that as the lease was the substance sold, and not a term of the supposed duration, and the vendors should have been acquainted with the condition of the property they offered for sale, the bill must be dismissed.⁴ The mere circumstance that the mistake is in a material matter, is not, without other considerations, a ground for the interposition of the court. To obtain this, it must be uncon-

¹ Peterson v. Grover, 20 Me., 363. As between the purchaser of an estate, and a third person claiming an equitable interest in the property, the purchaser may, under certain circumstances, be charged with implied notice of the contents of a deed whether he examined it or not; and he may also be chargeable with a fact which came to the knowledge of his attorney or agent for making the purchase. But this rule is not applicable as between the vendor and the purchaser. Champlin v. Laytin, 18 Wend., 407; S. C., 6 Paige Ch., 189.

² Upham v. Hamill, 11 R. I., 565.

³ Stone v. Godfrey, 5 De G. M. & G., 76; Carpmael v. Powis, 10 Beav., 39; M'Ferran v. Taylor, 3 Cranch, 268; Harrod v. Cowan, Hardin, 512; Trigg v. Read, 5 Humph., 529; Weaver v. Carpenter, 10 Leigh, 37; Segur v. Tingley, 11 Conn., 134.

Okill v. Whittaker, 1 De G. & Sm., 83; Affd. 2 Phil., 338.

scionable for the party deriving benefit from the mistake to retain his advantage.¹

§ 360. *Agreement made to conform to what was intended.*—Equity looks rather to the intention of the parties than to the phraseology of the contract. When, therefore, such intention is not correctly expressed, the court will refuse to decree specific performance;² but will carry out the original intention of the parties,³ notwithstanding the language employed is in the very words intended.⁴ When, in case of mistake, the parties can be placed in the same position they were in before the contract was entered into, the court will reform the instrument, and give the defendant the option to have the contract annulled, or to take it in the form which was intended.⁵ If the parties leave out

¹ 1 Fonb. Eq., B. 1, Ch. 2, Sec. 7; Warner v. Daniels, *supra*; Crowder v. Langdon, 3 Ired. Eq., 476. "In all such cases, the ground of relief is not the mistake or ignorance of material facts alone, but the unconscientious advantage taken by the party by the concealment of them." Story's Eq. Juris., Sec. 147.

² James v. State Bank, 17 Ala., 69; Mechanics' Bank v. Lynn, 1 Pet., 376; King v. Hamilton, 4 Ib., 311; Bradbury v. White, 4 Me., 391; Mitchell v. Nicholson, 8 Yerg., 194; Morgenthau v. White, 1 Sweeney, 395. A court will not enforce a deed or obligation in an event not anticipated by either of the parties, and inconsistent with their original intention. Quick v. Stuyvesant, 2 Paige Ch., 84. Where a contract of sale was made by a sheriff under a decree for the foreclosure of a mortgage, and, after the sale, it was first discovered that the wife of the mortgagor had not executed the mortgage so as to release her right of dower, a decree for specific performance was denied, although the sale was made subject to all incumbrances. Ely v. Perrine, 2 N. J. Eq. (1 Green), 396.

³ Hunt v. Freeman, 1 Ohio, 490; Clopton v. Martin, 11 Ala., 187; Langdon v. Keith, 9 Vt., 299; Firmstone v. De Camp, 2 C. E. Green, 317; Webster v. Harris, 16 Ohio, 490; Frisby v. Ballance, 5 Ill. (4 Scam.), 287; Ring v. Ashworth, 3 Iowa, 452; Mosby v. Wall, 23 Miss., 31; Leavitt v. Palmer, 3 N. Y., 19; McElderry v. Shirley, 2 Md., 25; Dulany v. Rogers, 50 Ib., 524; Cummings v. Steele, 54 Miss., 647. The interposition of a court of equity to correct mistakes by ordering a proper deed to be executed according to the intent of the parties, is a very ancient doctrine. Spence's Eq. Juris., Vol. I., p. 633, *note*. Cases have often occurred in which parties have been relieved against bargains and agreements entered into under a misconception of their rights. Bingham v. Bingham, 1 Ves. Sen., 126; Cocking v. Pratt, Ib., 400.

⁴ Smith v. Jordan, 13 Minn., 264.

⁵ Harris v. Pepperel, L. R. 5, Eq. 1. The weight of authority is in favor of the power of a court of equity to reform written instruments, whether such relief is sought by the plaintiff or defendant, and whether the matter to be corrected has originated in fraud or mistake. Smith v. Allen, Saxton, 43; Hendrickson v. Ivins, Ib., 562. A bond may be reformed on full and satisfactory proof of mistake, even against sureties, upon the principle that where a mistake is manifest, the court, in the exercise of its ordinary discretion, will correct it, and hold the party according to his original intention. Smith v. Allen, *supra*. Courts of admiralty cannot maintain an original bill for specific performance, or

of the written contract a stipulation by mistake, specific performance will be decreed of the whole agreement, including the stipulation;¹ but not if there was no mistake, and the parties did not intend that the omitted stipulation should form a part of the agreement, and its insertion is sought as a matter of propriety.²

§ 361. *Mistake of one party without the fault of the other.*—At law, where it is claimed that the writing does not truly represent the intention, it must be shown that both parties understood the contract as it would have been but for the mistake; and it is not enough to show the understanding of one of the parties only.³ But a court of equity will not enforce the specific performance of an agreement against a party who entered into it under a mistake, although the plaintiff was not guilty of any improper conduct and the mistake was solely that of the defendant, if it appears inequitable that there should be a specific performance.⁴ A contract may be valid in itself, and yet specific performance be refused. Where a person has been induced by some mistake or misrepresentation to enter into a con-

to correct a mistake, or to grant relief against a fraud, though they may perhaps sometimes, like courts of law, perform what may be deemed analogous functions. But if the contract be an executed maritime contract, the jurisdiction attaches; and the admiralty may then administer relief upon the contract according to equity and good conscience. *Andrews v. Essex Ins. Co.*, 3 Mason, 6, per Story, J.

¹ *Joynes v. Statham*, 3 Atk., 388; *Fife v. Clayton*, 13 Ves., 546; *Gwynn v. Lethbridge*, 14 Ib., 585; *Bradford v. Union Bank of Tennessee*, 13 How., 57.

² *Hare v. Shearwood*, 1 Ves., 241; *Haynes v. Hare*, 1 H. Blk., 659; *Lord Ingham v. Child*, 1 Bro. C. C., 92; *Lord Portmore v. Morris*, 2 Ib., 219; *Cripps v. Gee*, 4 Ib., 472; *Pitcairn v. Ogbourne*, 2 Ves. Sen., 375. See *Betts v. Gunn*, 31 Ala., 219; *Thompson Scale Manf. Co. v. Osgood*, 26 Conn., 16. Where a party, promising to insert a particular clause in a written contract, leaves it out knowingly, but without fraudulent intent, specific performance will be decreed of the whole agreement including the omission. *Jackson v. Cator*, 5 Ves., 688.

³ *Lyman v. Utica Ins. Co.*, 17 Johns, 373; *Lies v. Stub*, 6 Watts, 48; *Coffing v. Taylor*, 16 Ill., 457; *Ruffner v. McConnell*, 17 Ib., 212; *Gordere v. Downing*, 18 Ib., 492; *Farley v. Bryant*, 32 Me., 474; *Wemple v. Stewart*, 22 Barb., 154; *Nevius v. Dunlap*, 33 N. Y., 676; *Leake on Contracts*, 168, 169.

⁴ *Malins v. Freeman*, 2 Keen, 25; *Alvanly v. Kinnaird*, 2 Mac. & G., 7; *Webster v. Cecil*, 30 Beav., 64; *Coles v. Brown*, 10 Paige Ch., 526; *Ely v. Perrine*, 1 Green Ch., 396. Where an executor erroneously supposing that he had the consent of his co-executors, contracted for the sale of his testator's leaseholds, it was held on the ground of mistake, that the purchaser could not compel specific performance. *Sneesby v. Thorne*, 1 Jur. N. S., 536. See *Sherman v. Wright*, 49 N. Y., 227.

tract with another, without the fault of the latter, the court may leave the former to pay the value of the contract in damages, instead of compelling him to perform what he never intended.¹ Where, therefore, a vendor at auction altered the particulars of sale by reserving a right of way, and directed the property to be sold according to such altered particulars, and the auctioneer by mistake signed the original particulars, it was held that the vendor could not be compelled to specifically perform according to those particulars, although the vendee had purchased in ignorance of the alteration.² So, where the owner of property offered by letter to sell it for twelve hundred and fifty pounds, instead of twenty-two hundred and fifty, which he intended, and the party to whom he wrote, accepted the offer by letter, the court refused to enforce the contract at the price named, the vendor having given notice of the mistake as soon as he discovered it.³ So, where the reversionary interest in land under a lease was sold, without any mention in the contract of sale of the rent, and the vendor intended that the rent should be paid to him during the term, a bill by the vendee for specific performance was dismissed, but without prejudice to his rights at law.⁴ Specific performance will be refused against a vendee who supposes that certain property which formed a material inducement to the purchase, was included in the sale, but which was not included;⁵ also against a vendee who inadvertently buys a lot at auction under the mistake that it is another lot which he intended to purchase.⁶ But if there was no good reason for the mistake, it will not avail the purchaser as a defence.⁷ Where a person wishing to own property in Essex, con-

¹ *Calverly v. Williams*, 1 Ves., 210.

² *Manser v. Back*, 6 Hare, 443.

³ *Webster v. Cecil*, 30 Beav., 64.

⁴ *Wycombe R.R. Co. v. Donnington Hospital*, L. R. 1, Ch. 268.

⁵ *Stapylton v. Scott*, 13 Ves., 426.

⁶ *Malins v. Freeman*, 2 Ke., 25. For the circumstances of this case, see *post*, § 363.

⁷ *Swaissland v. Dearsley*, 29 Beav., 430.

tracted to purchase a house on the north side of the river Thames, which he supposed was in that county, but which proved to be in Kent, he was compelled in equity to complete the purchase.¹

§ 362. *Where mistake of defendant is caused by plaintiff.*—It follows from the principles previously discussed, that if the defendant has been misled to his prejudice by the plaintiff, specific performance will not be decreed; such conduct often partaking of the nature of fraud, if not positively fraudulent. Where, in a sale at auction, the vendee threw the vendor off his guard by making him believe that the vendee did not intend to bid, and by a misapprehension on the part of the person employed to make the reserved bidding, the property was knocked down to the vendee, the court, although there was no fraud, refused to enforce the sale.² Again, real estate being sold in lots, it was stated in the particulars that the timber on lots four and five was to be taken at a valuation. One of the conditions of sale also stated (speaking generally) that the purchaser was to take the timber at a valuation. It was held, that as the declaration, with reference to lots four and five, was calculated to mislead the purchaser as to the meaning of the conditions, supposing the right construction of them was that it applied to all the lots, it would be inequitable to enforce specific performance of the contract.³ On a sale of a villa residence containing a little over two acres, the plan exhibited the western side bounded by a strip of land covered with a mass of shrubs. The proposed purchaser,

¹ Shirley v. Davis, cited 6 Ves., 678; 7 Ib., 270. Where a person enters into a contract with a railroad company to permit it to lay its rails across his land by any one of several routes which it may select, he cannot resist the performance of his agreement on the ground that he had reason to believe, either on his own judgment, or from the representations of the company, or other persons, that a route would be adopted different from the one which was taken. "If, in fact, the one route would cause more damage, and the land-owner intends to claim larger compensation in one case than the other, the alternative must be stipulated for in the agreement itself." Western R.R. Corp. v. Babcock, 6 Metc., 346, per Shaw, C. J.

² Mason v. Armitage, 13 Ves., 25; Pym v. Blackburn, 3 Ib., 34.

³ Higginson v. Clowes, 15 Ves., 516.

inspecting the property with the plan in his hand, found on the western side a belt of shrubs and three large trees, and beyond them an iron fence. He then bid for the property, believing that it extended to the fence. He subsequently found that the three trees and iron fence stood on the adjoining land, the real boundary being indicated by stumps which were concealed by the shrubs. The plan represented all of the trees which stood on the property, but did not show the three large trees. If the latter had been on the property it would have been more valuable. It was held (reversing the decision of the vice-chancellor), that, as the purchaser was misled by the fault of the vendor, specific performance could not be decreed against him, and that whether the purchaser wished to escape from the bargain for a totally distinct reason, was a question with which the court had no concern.¹

§ 363. *Examples of mistake by defendant alone.*—It is to be borne in mind, however, that, as previously stated, the relief is not confined to cases in which the defendant has been led into error by the plaintiff, but that it extends to mistake, which is wholly due to the defendant himself, or his agent.² Thus, an error in a deed was relieved against at the suit of the person who drew the conveyance.³ So, intoxication may be a defence, though in no wise caused by the plaintiff.⁴ Where the agent of a party went to an auction-room, and, after listening to the description of the property about to be sold, which was entirely different from that which he was employed to buy, hastily and inconsiderately bid for, and ultimately purchased it, thinking it to be the property for which he was to bid, the court refused to enforce the sale.⁵ So, where the owner of property to be sold at auction withdrew part of it, but the auctioneer by mistake sold the whole, specific performance

¹ Denny v. Hancock, L. R. 6, Ch. 1.

² *Ante*, § 361.

³ Ball v. Storie, 1 Sim. & Stu., 210.

⁴ Cooke v. Clayworth, 18 Ves., 12; Nagle v. Baylor, 3 Dr. & W., 60.

Malins v. Freeman, 2 Ke., 25.

was refused, though the purchaser was justified in believing that he bought the whole.¹ And where an erroneous description of parcels as to quantity was prepared by the vendor's solicitor from a previous description made out by another solicitor from the report of a surveyor, the court declined to enforce the sale against the vendor, except with compensation.² Where a manor was sold comprising valuable property, which the vendor, being ignorant of its extent, did not know was within it, and both parties, at the time of the contract, supposed that it included something different, specific performance was refused.³ A defendant, being tenant for life of an estate under a settlement containing a proviso that if he purchased and settled an estate in fee simple in possession, in some convenient place or places, of a value equal to, or greater, than the estate comprised in the settlement, this estate should become the property of the tenant for life, and supposing that he had, with the concurrence of his wife, an absolute power of disposition over the settled estate, entered into a contract of sale, the court refused to enforce the sale by an exercise of the proviso in the settlement, on the ground that such a performance of the contract would be attended with difficulty, and that the defendant had not contracted for that purpose or with that intention.⁴

§ 364. *Who entitled to relief.*—In case of mistakes in written instruments, a court of equity will interfere as between the original parties or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, judgment creditors or purchasers from them with notice of the facts; and it will make no difference if the property embraced in the

¹ Manser v. Back, 6 Hare, 443.

² Leslie v. Tompson, 9 Hare, 268. And see Alvanley v. Kinnaird, 2 M'N. & G., 7; Helsham v. Langley, 1 Y. & C. C. C., 175.

³ Baxendale v. Seale, 19 Beav., 601.

⁴ Howell v. George, 1 Mad., 1; Fry on Specif. Perform., 216.

deed has been sold upon execution, the purchaser, with notice, taking no more than the execution debtor held.¹

§ 365. *How mistake may be committed.*—There may have been a mutual mistake in relation to some material fact connected with the agreement forming the consideration or inducement; or the mistake may have been made in drawing the instrument. In the latter case it may be a mistake of law or fact, and be committed by the scrivener, or by one of the parties.

§ 366. *Mistake as to what is meant to be sold.*—When, at the time of entering into a contract, both of the parties are mistaken in relation to the subject matter, the contract will not be enforced; and it may be rescinded upon a bill, filed for that purpose, by either party.² This is the situation when there is a mutual mistake, unaccompanied by fraud, and the property which one party intended to sell, and the other intended to buy, did not in fact exist; or where the subject matter of the sale and purchase is so materially variant from what the parties supposed it to be, that the substantial object of the sale and purchase has failed.³

¹ *Simmons v. Worth*, 3 Miss., 67; *Young v. Coleman*, 43 Mo., 179; *Story's Eq. Juris.*, Sec. 165.

² *Leake on Contracts*, 172; *Daniell v. Mitchell*, 1 Story, 173; *Miles v. Stevens*, 3 Pa. St., 21; *Irick v. Fulton*, 3 Gratt., 193; *Leger v. Bonnaffe*, 2 Barb., 475; *Pitcher v. Hennessey*, 48 N. Y., 415. If a contract for the conveyance of real estate is ambiguous, or, for want of skill on the part of the draftsman or through fraud or mistake, does not truly express the agreement of the parties, or where the contract is one which, in equity and good conscience, ought not to be specifically enforced, the parties will be left to such redress as can be obtained in an action at law. *Snell v. Mitchell*, 65 Me., 48. See *Youell v. Allen*, 18 Mich., 108. Where a deed was executed, in pursuance of an agreement between the parties, and it was afterward discovered that the boundaries therein described did not include a building named in the agreement, but not in the deed, and supposed by both parties to have been conveyed, it was held that equity would not reform the deed, nor compel execution of a deed in specific performance of the agreement. *White v. Williams*, 48 Barb., 222. Where a contract in writing described parcels of land not intended, and neither party had taken action under the contract, a bill to correct the error, and to enforce the contract, when corrected, was dismissed. *Cliner v. Hovey*, 15 Mich., 18.

³ *Marvin v. Bennett*, 8 Paige Ch., 311. See *Smyth v. McCool*, 2 N. Y. Weekly Dig., 84. The owners of real estate agreed to grant to A. a lease of the minerals under it to the west of a certain fault supposed to run through the land in the direction of a line drawn on a certain plan; the land being described as supposed to be eighty-three acres or thereabouts. They entered into a similar agreement with B. as to the minerals under the land to the east of the fault; supposed to

A. and B. respectively owning land in the same patent, and supposing that there was a gore of land which belonged to A. between the two lots, A. agreed to convey, and B. to purchase, such gore. It afterward appearing that there was no such gore, it was held that B. could not maintain a suit for specific performance, and compel A. to convey a part of his lot equal to the supposed gore, nor for compensation in damages.¹ A suit was brought for a conveyance of seven acres of land, part of an estate sold at auction and purchased by the plaintiff as being contained in the advertisement of sale, and described as being in the possession of one G. The defendant insisted that he did not intend to include those seven acres, or know that they were in the possession of G. The court said: "No doubt, if one party thought he had purchased *bona fide*, and the other party thought he had not sold, that is a ground to set aside the contract, that neither party may be damaged. Because it is impossible to say, one shall be forced to give that price for part only which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of part only."² The court will, even in the case of a completed contract, give relief against a common mistake without fraud. The defendant contracted to buy from the plaintiff freeholds and leaseholds on condition that he should assume that A., at his death in 1841, had the fee of the freeholds, and should not "require the production of, or investigate or make any objection in respect of, the prior title." The defendant, having accepted the title, contracted to sell the lands with a farm

contain ninety-eight acres, or thereabouts. It subsequently appeared that the fault ran so as to leave on the west eight acres only. B. having filed a bill to restrain A. from working coal to the east of the fault, it was held that the court, in a suit by B. against the owners for specific performance, would not have decreed a demise of all the minerals to the east of the fault, and that he could not be deemed in constructive possession, so as to maintain his suit against A. *Davis v. Shepherd*, L. R. 1, Ch. 410.

¹ *Morss v. Elmendorf*, 11 Paige Ch. 277.

² Lord Thurlow in *Calverley v. Williams*, 1 Ves., 210. And see *Hitchcock v. Giddings*, 4 Price, 135.

of his own adjoining the freeholds to a sub-purchaser, who discovered that the freeholds were never the property of A., but at the date of the contract were in fact owned by the defendant, subject to a leasehold interest in the plaintiff. The defendant refusing to complete, the plaintiff brought a suit for specific performance, alleging that she had also discovered that part of the land she had contracted to sell as leaseholds, belonged to her in fee simple, and offering mutual waiver or compensation. It was held that as there was a common mistake, an inquiry must be directed as to the title to the freeholds at the date of the contract.¹

§ 367. *Mistake as to nature of contract.*—Specific performance of a contract will not be decreed when the court is satisfied that such contract was entered into with an imperfect understanding of its nature in a matter materially affecting it.² Where a party contracted to exchange a house and lot for land situated in another State, and supposed by both parties to be in a certain county of that State, whereas the land, in fact, lay in a less valuable section of the State, a bill filed by the owner of the land for specific performance of the agreement was dismissed, but without costs; the vice-chancellor remarking that the defendant was justified in saying that the instrument he signed did not contain the agreement he entered into.³ Where

¹ Jones v. Clifford, L. R. 3, Ch. D. 779.

² Pendleton v. Dalton, Phil. N. C. Eq., 119; Cuff v. Dorland, 50 Barb., 438. But it is otherwise when, notwithstanding the mistake, the contract can be substantially carried out. Where the owner of two lots agreed to sell them, both he and the purchaser supposing that they contained together one hundred and eighty-seven and a half acres, when, in fact, owing to an error of the surveyor in running the boundary of one of the lots, they fell short forty-three and a half acres, it was held, in a suit brought by the assignees of the vendee for specific performance, that the complainants were entitled to a decree so far as the defendant could make a title, and that for the deficiency there must be a ratable deduction from the price. Voorhees v. De Meyer, 2 Barb., 27. Where a party agreed to dig gravel for the benefit of another, and there was a mutual mistake as to the land from which it was to be dug, and a subsequent written agreement was entered into, by which other land was substituted, and the party agreed to pay for the first land, it was held that such mistake was not a ground for dismissing a bill for the specific performance of the last agreement. Old Colony R.R. Co. v. Evans, 6 Gray, 25.

³ Best v. Stow, 2 Sandf. Ch., 298.

two persons agreed upon the sale and purchase of a tract of land, believing the quantity to be less than it really was, and, by mistake, still less was conveyed, the court refused to decree a conveyance of the whole, or to compel a conveyance of the quantity supposed to be contained in the tract.¹ It having been announced, at a sale of real estate under a decree, that the land was to be sold free of incumbrances, and that all taxes and assessments were to be paid out of the purchase money, provided the bills thereof were furnished to the master before the completion of the sale, and it having subsequently appeared that a heavy assessment for opening a street through the property had not, at the time of the sale, been confirmed, though the work had been done more than three years before that time, it was held that as the land had been purchased under a mistake, the vendees were entitled to a resale.²

§ 368. *Mistake in drawing contract.*—If both parties correctly understand the matters in respect to which they contract, but commit an error in reducing their agreement to writing, the contract will be reformed, instead of being rescinded; otherwise both would be deprived of the benefit of it; and if it were enforced as it stood, one party would necessarily be injured.³ In the exercise of this jurisdiction

¹ Carbury v. Tannehill, 1 Har. & Johns, 224. A. and B. contracted for the exchange of lands. A. filed a bill for specific performance, and for damages on account of an alleged deficiency in the quantity contracted to be exchanged by B. It appeared that there was a mutual mistake as to the quantity. But no fraud was shown on the part of B., or mistake in reducing the contract to writing. It was held that no indemnity could be decreed to A., and that his bill must be dismissed without prejudice. Yancey v. Green, 6 Dana, 444.

² Post v. Leet, 8 Paige Ch., 337.

³ Wake v. Harrop, 1 H. & C., 202; Ashurst v. Mill, 7 Hare, 502; Druiff v. Parker, L. R. 5, Eq. 137; Barrow v. Barrow, 18 Beav., 529; Murray v. Parker, 19 Ib., 308; Malmesbury v. Malmesbury, 31 Ib., 407; Scholfield v. Lockwood, 32 Ib., 436; Reade v. Armstrong, 7 Ir. Ch., 375; Washburn v. Merrill, 1 Day, 139; McMillin v. McMillin, 7 Mon., 560; Desell v. Casey, 3 Dessaus Eq., 84; Keyton v. Branford, 5 Leigh, 39; Brown v. Bonner, 8 Ib., 1; Finley v. Lynn, 6 Cranch, 238; Leonard v. Austin, 2 How. (Miss.), 888; Scott v. Duncan, 1 Dev. Eq., 403; Goodell v. Field, 15 Vt., 448; Collier v. Lanier, 1 Kelly, 238; Alexander v. Newton, 2 Gratt., 206; Larkins v. Biddle, 21 Ala., 252; Stedwell v. Anderson, 21 Conn., 139; Manz v. Beekman Iron Co., 9 Paige Ch., 188; Newcomer v. Kline, 11 Gill & Johns, 457; Gump's Appeal, 65 Pa. St., 476; Pickett v. Merchants' and National Bank, 32 Ark., 346. "It requires very strong

no distinction is made between real and personal property.¹ The aim of the court, in giving relief for a mistake, is to put the parties as nearly as possible in the situation they would have been in but for the mistake. Where the contract has been executed the court is slow to rescind it, even for causes which would be thought to warrant its rescission had it remained *in fieri*. To afford relief in the milder form is not to make a new contract for the parties, but simply to refuse to set aside the contract which they have made for themselves under a mistake, provided the party profiting by the mistake will do a more perfect equity by correcting the same.² But the mistake, which a court of equity has jurisdiction to correct, must be a mistake in reducing the actual agreement of the parties to writing; not a mere error in settling the terms of the contract by which a party has failed to make as good a bargain as he expected.³ The party seeking to reform a written instrument must show that a material stipulation was omitted or inserted contrary to the intention of both parties.⁴ If it be clearly shown that the intention of one of the parties is mistaken and misrepresented by the written contract, that cannot avail, unless it be further shown that the other party agreed to it in the same way, and that the intention of both of them was, by mistake, misrepresented by the written contract.⁵ Where, without fraud or misrepresentation, there

equities to induce a court to refuse to enforce a written contract even where a mistake is alleged to have been made in drawing it up." Campbell, J. Rogers v. Odell, 36 Mich., 411. See *ante*, § 254.

¹ McKay v. Simpson, 6 Ired. Eq., 452. Equity never interferes to aid one creditor against the other on the ground of mistake. Knight v. Bunn, 7 Ib., 77.

² Where an agreement was entered into for the transfer of shares in a corporation upon the payment at maturity without grace of a note given for the price, and, owing to a mistake in the wording of the agreement and note, payment was not tendered until the last day the note would have been due if it had been made in the usual form, it was held that a bill might be maintained for specific performance if there were circumstances to excuse the mistake and to show that the defendant ought not to avail himself of it. Todd v. Taft, 7 Allen, 371.

³ Kennedy v. Umbaugh, Wright, 327. ⁴ Nevius v. Dunlap, 33 N. Y., 676.

⁵ Lyman v. United Ins. Co., 17 Johns, 373; Wemple v. Stewart, 22 Barb., 154; Pennell v. Wilson, 2 Abb. Pr. N. S., 466; Lanier v. Wyman, 5 Robertson, 147; Cooper v. Mu. Fire Ins. Co., 50 Pa. St., 299. The allegations of a bill in

was a mutual mistake of the parties as to the proper mode of filling out a policy of insurance, the application being made in the wrong name, and the policy issued to the wrong person, it was held that the mistake would be corrected, although it was one of law.¹ So, a mistake in a policy of insurance may be corrected where a material part of the description of the premises furnished by the insured to the secretary of the insurers was omitted.²

§ 369. *Where a deed does not express what was intended.*—A court of equity will relieve against mistakes in the drawing of deeds, when, by accident or fraud, they are not drawn in accordance with the agreement of the parties.³ Where the vendor sought the reformation of a deed because it conveyed the land sold together with all its appur-

equity, which were admitted by demurrer, were, that under a contract made by the complainant with the intestate for the purchase of certain land, he was entitled to a warranty deed; that the administrator of the intestate undertook to make such a conveyance, but by mistake neglected to insert a covenant of warranty, and represented to the complainant that the deed was in pursuance of the order of the court; and that the complainant being uninformed as to the effect of the words employed, accepted the deed, supposing that, if evicted, he would have a remedy over against the heirs. The complainant further alleged that he had been evicted from said land by the paramount title of the heirs, and he prayed an account of what was due him for his purchase money and interest, costs, trouble, and expense in litigating the title. The demurrer having been sustained and the bill dismissed in the court below, the decree was reversed, on the ground that ordinary justice required that the complainant should be remunerated from the property of the intestate, and that, in this class of cases, such mistakes were relievable in equity. *Evants v. Strobe*, 11 Ohio, 480. A. entered into a contract with B. to sell him certain land by deed in fee simple with covenants of warranty. Afterward B. obtained a loan on the security of the land, and the attorney of the lender to perfect the title caused a quit-claim deed to be made by A. to B., which B. accepted, supposing that it conformed to his agreement with A. It was held, on a bill for specific performance filed by B. against A., that as B. accepted the quit-claim deed under a mistake, he was entitled to a decree compelling A. to execute a warranty deed, which could be made excepting the incumbrance, or be ante-dated so as to take effect simultaneously with the quit-claim deed. *Point Street Iron Works v. Simmons*, 11 R. I., 496.

¹ *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn., 517.

² *Moliere v. Pennsylv. Fire Ins. Co.*, 5 Rawle, 342.

³ *Sandford v. Washburn*, 2 Root, 499. Where the vendor of a slave having procured a friend to write the bill of sale, which, by the agreement between the seller and buyer, was not to contain a covenant of warranty as to soundness, the slave having previous to that time been afflicted with fits, the following clause was inserted in the bill of sale: "Said negro man I warrant to be sound at this time," it was held that the vendor was entitled to relief in equity from the covenant, and a perpetual injunction was granted against the suit of the vendee upon it. *Clopton v. Martin*, 11 Ala., 187.

tenances, without reservation, when, by the agreement, the vendor was to retain the right to use the water from a spring, and to convey it through aqueducts to several houses owned by him in the vicinity, the vendee, though he denied that there was any mistake, was directed to reconvey to the vendor the right to the use of the spring.¹ A vendee and his subsequent grantees were perpetually enjoined from erecting any building on ten feet front of a lot in the city of Louisville, so as not to exclude light and air from the house of the vendor, it having been proved that when the strip of ten feet was sold it was agreed that the front should remain an open space, which stipulation was left out of the deed by mistake.² If a deed shows on its face that the grantees are to hold the property in trust, a court of equity will look to the surrounding circumstances to ascertain the true intention of the parties, and, when discovered, will give it the proper form. Where a grant was to trustees, "and their successors forever," to them, "their successors and assigns," and to "their heirs," it was held that this, when taken in connection with the covenant for further assurance, and the further fact that a good title was to be given, and that a fee simple price was paid for the land, entitled the grantees to a decree requiring the execution to them of a deed in fee.³

§ 370. *Error as to property conveyed or grantee.*—If, by

¹ Brown v. Lampton, 25 Vt., 258. See *ante*, § 254.

² Athy v. McHenry, 6 B. Mon., 59. Where A. B. and C., tenants in common of land, entered into an agreement for its partition, by which A. was to have allotted to him the portion then in his possession, and, by a mistake of the commissioners in running the line, a part of A.'s share was set off to and deeded to B., it was held that the facts constituted a good equitable defence to an action of ejectment brought by B. against A. for such part of A.'s share. Guedici v. Boots, 42 Cal., 452. And see Talbert v. Singleton, *Ib.*, 390.

³ Showman v. Miller, 6 Md., 479. In Terrett v. Taylor, 9 Cranch, 53, the court said: "It would seem, therefore, the present deed did not operate by way of grant to convey a fee to the church-wardens and their successors; for their successors, as such, could not take; nor to the church-wardens in their natural capacity, for heirs is not in the deed. But the covenant of general warranty in the deed binding the grantors and their heirs forever, and warranting the land to the church-wardens and their successors forever, may well operate, by way of estoppel, to confirm to the church and its privies the perpetual and beneficial estate in the land." And see Mason v. Muncaster, 9 Wheat., 445.

mistake, real estate has been conveyed which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee in good conscience has no right to retain, a court of equity will interfere and correct the mistake, whether it arose from a misapprehension of the facts, or of the legal operation of the deed. But if the conveyance is such as the parties intended it should be, and the grantee may in good conscience retain the property, although the grantor may have been mistaken as to the extent of his title, a court of equity will in general refuse to interfere.¹ Where, in an exchange of lands acre for acre, one of the parties, through mistake or fraud, got more land than he was entitled to under the contract, he was compelled to re-convey the surplus, although the deed was for "more or less," and the other party, before discovering the mistake, expressed himself satisfied with the exchange.² The mistake may consist in omitting from the deed a portion of the premises intended to be conveyed.³ If there be a mutual mistake of the parties to a deed in the description of the

¹ *Stedwell v. Anderson*, 21 Conn., 139. Where the plaintiff, in selling and conveying land, by mistake included in the deed other land not intended to be sold, it was held that he was entitled to relief in equity, although the defendant in his answer denied the mistake. *Newsom v. Bufferlow*, 1 Dev. Eq., 383. In a suit for the rescission of a contract of sale of real estate on the ground of mutual mistake, it appeared that the plaintiff, being the owner of a farm and wishing to sell a portion of it, employed a broker to make the sale; that the broker caused the portion intended for sale to be surveyed and divided into lots, with figures inscribed on each lot as mapped, to show the number of feet it contained; that, in accordance with a previous advertisement, the lots were offered for sale at public auction, and lot number one struck off to the defendant at five and a quarter cents a foot, and a conveyance made to him upon his paying the price as computed according to the figures marked on the plan; that both parties supposed at the time this computation correct, but that, several months afterward, the plaintiff discovered that the lot in fact contained about twelve thousand more feet than the number marked. It was held that the conveyance must be rescinded, unless the defendant would pay for the additional number of feet at the auction price, and according to the conditions of the sale. *Lawrence v. Staigg*, 8 R. I., 257.

² *Shipp v. Swann*, 2 Bibb., 82. It is not a ground for setting aside a sale of personal property that the price asked was small, the vendor mistakenly supposing that there was a mortgage lien on it, although the purchaser knew otherwise. *Drake v. Collins*, 5 How. Miss., 253.

³ *Tilton v. Tilton*, 9 N. H., 385.

land sold, a court of equity will reform the conveyance on a bill filed against the executor and heirs of a deceased vendor.¹ This will be done by a decree stating the reform required, with such an order as may be necessary and proper to carry the decree into effect.² The equitable right of a person to have a conveyance of land intended to be embraced in a deed to him, but left out by mistake, will prevail against the legal lien of a subsequent judgment against the grantor.³ A mistake made in a deed in locating land will be corrected.⁴ So, a deed which, by mistake, is made out to the wrong person, will be reformed. Where a father, intending to convey land to his married daughter and the heirs of her body, by mistake conveyed it to his son-in-law and his heirs, it was held, affirming the judgment of the court below, that the deed could be reformed even after the death of both the grantor and grantee, upon clear and satisfactory evidence of the mistake.⁵ Four sisters, being joint owners of certain land which they and their husbands wished to have set off to them in severalty, it

¹ *Smith v. Greeley*, 14 N. H., 378. See *post*, § 407.

² *Craig v. Kittredge*, 23 N. H., 231. Where the defence to an action of ejectment is, that in consequence of a mistake in the description of land conveyed to the defendant by the plaintiff, the premises in question were omitted from the deed, a reformation of the deed is not necessary. The same state of facts which would entitle the defendant to a reformation of the deed, would establish his equitable right to the possession, and would as effectually defeat the action as would the legal title. *Hoppough v. Struble*, 60 N. Y., 430.

³ *Gouverneur v. Titus*, 1 Edw. Ch., 477; *Affd.* 6 Paige Ch., 347. A., the husband of B., in April, 1858, entered into a written contract under seal for the sale of ten lots of land to C. The purchase money was paid by C., pursuant to the agreement, and possession taken by him of the whole ten lots. In January, 1860, A. and B. gave C. a warranty deed which, for fifteen years, he supposed embraced the whole ten lots, when it in fact only conveyed eight of them. At that time, A. being dead, C. applied to B. to give him a deed of the two lots, which she refused to do. A deed of the lots was given to B. by D., the owner of them, in November, 1859, but not delivered until March, 1860. The negotiation for the sale of the lots to C. was conducted by A. in behalf of B., who received the purchase money. It was held that C. was entitled to a conveyance of the two lots from B., and it was directed accordingly. *Hensler v. Seffrin*, 19 Hun., 564. A bill will lie for a specific performance, and a proper deduction, where land is sold under a mistake of both parties as to the boundaries whereby a house intended to be conveyed, was not conveyed, and the purchaser demanded a deduction of the value of the house before paying the second note for the purchase money. *Austin v. Ewell*, 25 Texas, 403.

⁴ *Raines v. Calloway*, 27 Texas, 678. ⁵ *Mattingly v. Speak*, 4 Bush, Ky., 316.

was mutually agreed that there should be a partition, and that the deeds should be drawn by one of the husbands. By mistake and ignorance of law, he inserted the name of each husband in the deed to his wife, although there was no intention that a greater interest should be conveyed to each husband than he was entitled to by virtue of his marital rights. One of the sisters having died without issue, upon a bill in equity brought by her heirs at law to have the deed reformed, it appeared that neither the wife, nor any of her sisters, had any knowledge of the mistake until about a year and a half previous to her decease, when the fact was communicated to her by her husband. It was held that there was nothing in the lapse of time which varied the rights of the parties; that there must be a decree in favor of the plaintiffs, but that the husband was entitled to be allowed for his proportional share of improvements made by him on the property.¹ A mistake in the legal effect of a description in a deed, or in the use of technical language, may be relieved against in equity, and parol evidence is admissible for that purpose. As where the parties intended that the title should be conveyed to the wife of the party, who paid the consideration, for her life, and after her death to her children, and through ignorance and mistake in drawing the deed, it was made to the wife and her heirs, the parties supposing that such a deed would have the effect intended.²

§ 371. *Mistake of draftsman.*—Errors in deeds or other instruments are most commonly owing to the ignorance or want of skill of some third person who is employed by

¹ Stedwell v. Anderson, 21 Conn., 139.

² Clayton v. Fleet, 10 Ohio St., 544. See Davenport v. Sovel, 6 Ib., 459. Where the parties to a lease agreed that an annual rent should be paid of three hundred dollars, payable in half-yearly instalments, and the lessor, to whom was intrusted the drawing of the lease, by mistake inserted the words "*semi-annual* rent of three hundred dollars," it was held that relief in equity would be granted against the assignee of the lease. Snyder v. May, 19 Pa. St., 235. Where it is agreed between the vendor and vendee, that the deed shall save the rights of a tenant in possession, but, through fraud or mistake of the vendee in drawing the deed, the stipulation is not inserted, the vendor is entitled to have the mistake corrected. Young v. Miller, 10 Ohio, 85.

the parties to draw them. Where an instrument is drawn and executed which professes or is intended to carry out an agreement previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfil that intention, or violates it, equity will correct the mistake.¹ A mistake so made in drawing a deed will be corrected even against the creditors of the grantor.² Where it was the intention of the parties that there should be conveyed a fee simple estate, and, by ignorance or mistake on the part of the draftsman, the word "heirs" was omitted from the deed, it was held that a court of equity would supply it.³ A father, having a daughter unprovided for, and whose husband was improvident, decided to vest some property in a trustee for her support, remainder to her children; and he accordingly instructed an attorney to draw the deed, who by mistake omitted the words, "to her sole and separate use," or equivalent expressions. It was held that the deed would be reformed as against the creditors of the husband, who were about to subject the property to their executions against him.⁴ Where, on a sale of real estate, it was agreed that growing grain and certain logs on the premises should be reserved from the purchase, and the scrivener declined to insert the reservation in the deed, because he considered it unusual if not improper to make such a reservation in a fee simple conveyance, it was held

¹ *Wintermute v. Snyder*, 2 Green Ch., 489; *Elmore v. Austin*, 2 Root, 415; *Cook v. Preston*, *Ib.*, 78; *Chapman v. Allen*, Kirby, 399; *Wooden v. Haviland*, 18 Conn., 101; *Gower v. Sterner*, 2 Whart., 75; *Rogers v. Atkinson*, 1 Kelly, 12; *Collier v. Lanier*, *Ib.*, 238; *Wycke v. Greene*, 16 Ga., 49; *Cooke v. Husbands*, 11 Md., 492; *McCann v. Letcher*, 8 B. Mon., 320; *McDonald v. Starkey*, 42 Ill., 442; *Chew v. Gillespie*, 56 Pa. St., 308; *Murphy v. Rooney*, 45 Cal., 78. "It is the well-settled rule of this State (Pennsylvania), that the mistake of a scrivener, in preparing a deed or other writing, may be shown by parol evidence, and the instrument reformed accordingly. It is but the exercise of the equity powers in all our courts from the earliest days of the province." *Sharswood, J.*, in *Huss v. Morris*, 63 Pa. St., 367. A mistake of the auctioneer in entering in his book of sales the name of the owner of land sold, will be corrected in equity, especially where the party objecting must have known who owned the property. *Pugh v. Chesseldine*, 11 Ohio, 109.

² *Alexander v. Newton*, 2 Gratt., 266; *Perkins v. Dickinson*, 3 *Ib.*, 335.

³ *Springs v. Harven*, 3 Jones Eq., 96.

⁴ *Stone v. Hale*, 17 Ala., 557.

that the deed would be reformed, whether the omission was to be regarded as a mistake on the part of the scrivener, or an inadvertence on the part of the vendor.¹ A deed of separation and settlement was designed by both parties to be in full satisfaction of any claim on the part of the wife either of dower or distribution out of her husband's estate. This intention not being expressed by reason of the mistake of the conveyancer who drew the instrument, it was held that a court of equity would supply the omission.² Where, when the vendor contracted for the sale of his land, it was agreed that a lien should be reserved for the unpaid purchase money, and both of the parties instructed the draftsman to so draw the deed as to secure this lien, which, through ignorance and mistake as to the requirements of the statute, he failed to do, it was held, reversing the judgment of the court below, that the deed should be reformed so as to allow the lien.³ If the parties have been misled by misplaced confidence in the skill of the scrivener, and there is a mistake in the legal effect of a description in a deed, or in the use of technical language, it is no answer to a bill in equity to have the deed reformed that the scrivener used the words he intended to use.⁴ But where the scrivener testifies that he drew the instrument according to his instructions, and that it was read to, and approved by, the parties, he will not be allowed to show that, owing to his want of skill, the intention of the parties was not correctly expressed.⁵

§ 372. *Correction of error in mortgage.* — Where a mortgage of real estate, by mistake, does not embrace a portion of the land agreed to be mortgaged, a court of equity, on a bill filed by the mortgagee, will reform the mortgage so as to correct the error, even as against the creditors of the mortgagor, and subsequent purchasers of

¹ Hendrickson v. Ivins, Saxton, 562.

² Parham v. Parham, 6 Humph., 287.

³ Worley v. Tuggle, 4 Bush Ky., 168.

⁴ Canedy v. Marcy, 13 Gray, 373.

⁵ Dupree v. M'Donald, 4 Dessaus Eq., 209.

the land omitted, with notice. And if the mortgagee, after a decree of foreclosure, and before the mistake is discovered, sells and conveys the land to a third person for a valuable consideration, both he and the mortgagor, supposing that the whole of it was included in the mortgage, the mortgagor will be entitled to have the decree opened, with further time to redeem, unless he advised such third person to purchase, and consented that he might do so.¹ A. mortgaged certain real estate to B., to secure B. as indorser of A.'s note. A tract of land, intended by the parties to be included in the mortgage, was omitted by mistake. Subsequently to the giving of the mortgage, creditors of A. obtained judgments against him, and there was reason to suppose that executions on the judgments would be levied on the land which, by mistake, had been left out of the mortgage. B. had paid the note, which was for a larger sum than the land mortgaged and the tract omitted were worth; and A. was insolvent. Upon a bill filed by B., it was held that he was entitled to a decree correcting the mistake, and freeing the tract omitted from the mortgage from the lien of the judgments.² So, it was held, in a suit by the mortgagee, that the mortgage should be reformed and specifically enforced, against the general creditors of the mortgagor, where the mortgage, by mistake, was made to secure one dollar instead of one hundred dollars.³ And, upon a bill

¹ *Blodgett v. Hobart*, 18 Vt., 414. Where, after the foreclosure of a mortgage, the mortgage is reformed so as to embrace land which, by mistake, was omitted from it, the right of the mortgagor to redeem is thereby revived. *Provost v. Rebman*, 21 Iowa, 419.

² *White v. Wilson*, 6 Blackf., 448.

³ *Huffman v. Fry*, 5 Jones Eq., 415. Where, on a sale of land, it was agreed that the vendee should give his bond and mortgage to secure the payment of three thousand dollars, and interest, and, by mistake, the bond and mortgage only provided for the payment of three hundred dollars annually, with interest on the same, so that the vendor was not entitled to interest annually on the whole amount remaining unpaid, it was held that the vendor was entitled to have the bond and mortgage reformed, a majority of the court thinking that there must have been fraud on the part of the vendee, or a mutual mistake of fact. *Rider v. Powell*, 28 N. Y., 310. *Wright, J.*, dissented, on the ground that the judge who tried the cause found that the mistake was only on the part of the plaintiff. He said: "I suppose the rule to be, that when there is a mistake on one side, and not a mutual mistake, it may be a ground for rescinding a con-

filed by the vendee against the heirs of the vendor, it was held that he was entitled to have a bond reformed so as to include lands left out by mistake in the description of several tracts, and to specific performance of the reformed bond.¹ Where real estate is sold under a decree of foreclosure, and conveyed to the purchaser, it being understood, not only by him, but by the bidders and persons generally at the sale, that the mortgage embraces all of the land, and the price for which it is struck off is what the whole would have brought, and it is subsequently ascertained that, from a mistake in the description, the mortgage does not include the whole premises designed to be mortgaged, in consequence of which the legal title fails, the devisee of the mortgagor will be perpetually enjoined from proceeding at law, and be decreed to release his right and title in the property to the purchaser.²

§ 373. *Intentional omission of term.*—If a term of the actual agreement be intentionally left out of the writing by the parties, the court will not reform the contract in this respect; a thing done on purpose, not being a mistake.³

tract, or for refusing to enforce its specific performance, but not a ground for altering its terms. A mistake by the plaintiff alone, when he made the contract, as to the interest he was to receive on the bond and mortgage, would not entitle him to have the contract so modified as to conform to his mistaken impression, though it might be a reason for rescinding the contract, on the ground that the minds of the parties never met in making it." See *Adam's Equity*, 171; *Lyman v. United Ins. Co.*, 17 Johns, 375. The New York court of appeals, reversing the judgment of the supreme court, directed the reformation of a mortgage of real estate, given for a loan of twelve thousand dollars, and enforced a lien, because valuable erections, which, previous to the execution of the mortgage had been appraised at six thousand five hundred dollars, were on the adjoining land to that actually described in the deed, the mortgagee supposing, and being led by the mortgagor to believe, that they were included in the mortgage. The court said: "It is unnecessary to refer to cases to establish the familiar doctrine that where, through mistake or fraud, a contract or conveyance fails to express the actual agreement of the parties, it will be reformed by a court of equity so as to correspond with such actual agreement." *De Peyster v. Hasbrouck*, 1 Kernan, 582.

¹ *Hunter v. Bilyou*, 30 Ill., 246.

² *Weldron v. Letson*, 15 N. J. Eq., 126. Where the intention was to mortgage land situated in township six, and, by mistake in drawing the mortgage, the land was described as being in township seven, it was held that the mistake would be considered as corrected, and the mortgage be treated as of land in township six. *Willis v. Henderson*, 4 Scam., 13.

³ *Lord Portmore v. Morris*, 2 Bro. C. C., 219; *Hare v. Shearwood*, 3 Ib., 168; *S. C.*, 1 Ves. Jr., 241.

Thus, where in a contract for an annuity, which the parties designed to be redeemable, it was agreed that the deed should not contain a clause of redemption, it being erroneously supposed that its insertion would make the contract usurious, it was held that a court of equity could not supply the omission; since the parties desired the court, not to do what they intended, but to put them in the situation they would have occupied if they had been better informed, and had entertained a contrary intention.¹ So, where a power of subsequent revocation is left out of a voluntary deed, the grantor erroneously supposing that he will, notwithstanding, have such a power, the deed cannot afterward be rectified by inserting the power.²

§ 374. *Verbal change of contract.*—A subsequent parol agreement varying the terms of the written contract cannot be proved on the ground of mistake, unless the refusal to perform it might amount to fraud.³ Accordingly, where A. entered into a written contract with B., who was the mere agent of C., for a lease, to commence on the 21st of April, and afterward A. and C. agreed by parol that the lease should commence on the 24th of June, instead of the

¹ *Irnham v. Child*, 1 Bro. C. C., 92; *Marquis Townshend v. Stangroom*, 6 Ves., 332, per Lord Eldon. And see *Pitcairn v. Ogbourne*, 2 Ves. Sen., 375; *Cripps v. Jee*, 4 Bro. C. C., 472.

² *Worrall v. Jacob*, 3 Mer., 270.

³ *Price v. Dyer*, 17 Ves., 356. It is the peculiar province of a court of equity to guard on one hand against fraud and mistake, and to avoid on the other the admission of parol evidence to contradict or vary a written contract. Although a court of equity will relieve against a writing which has been drawn materially and clearly different from the contract of the parties, and by mistake executed, yet if the party bound is fully apprised, in point of fact, of the manner in which the instrument is expressed, and he executes it, or the other party receives it, as containing the contract, parol evidence varying its legal import, without the imputation of fraud, if it can be received in any case, will be admitted with great caution. *Coger v. M'Gee*, 2 Bibb., 321. A bill for relief against a mistake in a deed cannot be supported on the ground of a parol promise of the defendant at the time of executing the conveyance. "The written executed contract must be regarded as declaring the whole contract then made, and such promises, if receivable at all, are admitted merely as evidence tending to show the equity *dehors* the conveyance, arising from the misapprehension of the parties. It is exceedingly clear that such evidence is to be regarded with extreme caution. For otherwise the courts would violate in effect the rule which they profess to hold sacred, that the operation of a deed, or other written instrument, shall not be abridged, enlarged, or altered by parol testimony." *Chamness v. Crutchfield*, 2 Ired. Eq., 148, per Gaston, J. And see *Blanchard v. Moore*, 4 J. J. Marsh, 471.

21st of April, and be made to C. instead of to B., and a suit was brought by C. and B. for the specific performance of the written contract as varied by the subsequent parol agreement, a plea of the statute of frauds was sustained.¹ So, where there was a written contract, and the defendant set up a subsequent parol agreement mutually abandoning the terms of the written contract, and containing new terms modifying and adding to the terms of the writing, it was held that the second agreement did not amount to a waiver of the first, and that, as the subsequent terms had not been acted on, the second agreement formed no defence to the first, which must be performed.² But although when the defendant entered into the written contract he fully understood its terms and consequences, yet if the plaintiff promised to vary the terms of it, which he refuses to do, it will sometimes be a defence to a suit for specific performance :³ as a promise by the vendor's agent that improvements shall be made on the adjoining property ;⁴ or to allow for a deficiency in quantity ;⁵ or a promise by the purchaser that the vendor shall have a lease of the property sold.⁶ And where parties, after entering into a contract for the sale of land, verbally agree to substitute a new contract, differing from the first agreement as to the time of payment and delivery of the deed, and the defendant in his answer admits the second or substituted contract, the complainant will be entitled to a decree for the specific performance of that contract, if he chooses to perform it on his part, and can have such relief in the then suit.⁷

§ 375. *Where enforcement of different contract would be unfair.*—Specific performance of an agreement with a

¹ Jordan v. Sawkins, 3 Bro. C. C., 388 ; S. C., 1 Ves., Jr., 402.

² Price v. Dyer, *supra*.

³ Clarke v. Grant, 14 Ves., 519 ; Micklethwaite v. Nightingale, 12 Jur., 638.

⁴ Myers v. Watson, 1 Sim. N. S., 523.

⁵ Winch v. Winchester, 1 Ves. & Bea., 375.

⁶ Vouillon v. States, 25 L. J. Ch., 875.

⁷ Ryno v. Darby, 20 N. J. Eq., 231 ; Wallace v. Brown, 2 Stockt., 308. But see Buck v. Dowley, 16 Gray, 555 ; Chambers v. Chalmers, 4 Gill & Johns, 438 ; Allen v. Burke, 2 Md. Ch., 534 ; Craige v. Craige, 6 Ired. Eq., 191.

parol variation will not be granted when it would be unfair to either party. Thus, where the plaintiff sought the enforcement of an agreement which the defendant successfully resisted by parol evidence of a subsequent contract, and the plaintiff insisted on the performance of the agreement so set up, the court refused to grant it, for the reason that it would be a surprise on the defendant to decree, under the prayer for general relief, the performance of an agreement which was not put in issue by the record.¹ So, where a very long time had elapsed, and compensation in respect to the parol variation must have been allowed, if the contract had been enforced for the period whilst the doubt about the terms of the contract had been subsisting, the bill was dismissed, but without costs.²

§ 376. *Plaintiff compelled to elect.*—When, in case of parol variation, it is shown to the court that the defendant contracted under a mistake, the plaintiff may elect either to have his bill dismissed, or to perform the agreement with the parol variation.³ This was held where the conditions of sale were such as were likely to have misled the defendant, and the defendant contended for a different construction from that of the plaintiff.⁴ So, where in a suit by the purchaser it appeared that the written contract confined a reference of expenses to those of conveyance, and the defendant proved that it was the intention of both parties that the plaintiff should also pay for making out the defendant's title, the plaintiff was put to his election either to have his bill dismissed, or to perform the agreement as

¹ *Legal v. Miller*, 2 Ves. Sen., 299. See statement of this case in *Price v. Dyer*, 17 Ves., 364.

² *Garrard v. Grinling*, 2 Swanst., 244.

³ *Clarke v. Grant*, 14 Ves., 519.

⁴ *Higginson v. Clowes*, 15 Ves., 516. In this case, "counsel for the defendant contended that it was not competent for the plaintiff to have his bill dismissed, but that the defendant, without filing a cross bill, might have specific performance of the agreement. Sir William Grant, however, held that that right existed where the defendant's construction was adopted by the court. But that where, as in the case before him, the court did not decide that the defendant's construction was right, but only that he had contracted under a mistake created by the plaintiff, the bill was dismissed." *Fry on Specific Perform.*, 218.

contended for the defendant.¹ Where the defendants introduced parol evidence to show that an agreement by several persons to give bonds in fifteen hundred pounds ought to have been for one joint bond by all in that amount, the plaintiff was compelled to elect to have his bill dismissed, or to take a decree for the joint bond, or to take an issue on which the witnesses could be examined.² In a suit by a landlord for the specific performance of a contract for a lease, the defendant set up a parol agreement to abate the rent, to which the plaintiff submitted, and the lease was directed with the abatement.³ And where it was proved that besides the written contract there was a verbal arrangement between the agent of the plaintiff and the defendant as to payment for timber and certain expenses, to which the plaintiff consented, specific performance was decreed.⁴

§ 377. *Omission of usual clause.*—When a term is omitted which one of the parties to the contract had just reason to suppose, and did suppose, would be inserted—as, for instance, a customary clause in a lease—the agreement will not be enforced against him, unless such condition is included.⁵ So, where specific performance was sought of a covenant for renewal which had been acted on in a different manner from its terms for a great number of years, it was held that the covenant could not be enforced according to its original terms, but only on the plaintiff's submitting to a conscientious modification of it to conform to the circumstances of the case.⁶

§ 378. *Mistaken understanding of contract.*—A person will not be permitted to evade his written agreement on

¹ Ramsbottom v. Gosden, 1 V. & B., 165. With reference to this case, Mr. Fry (Specif. Perform., 218, *note*), very properly suggests the query, why specific performance was not enforced on the defendant's contention, as it appeared that the mistake was committed in reducing the agreement to writing.

² Lord Gordon v. Marquis of Hertford, 2 Mad., 106.

³ Clarke v. Moore, 1 Jon. & L., 723.

⁴ London & Birmingham R.R. Co. v. Winter, Cr. & Ph., 57.

⁵ Ricketts v. Bell, 1 De G. & Sm., 335. ⁶ Davis v. Hone, 2 Sch. & Lef., 341.

slight parol evidence of mistake.¹ But where the defendant referred in a letter to an offer as having been previously made to another party, and such party testified that, in the offer as made to him, the term omitted in the subsequent offer was contained, it was held that mistake on the part of the defendant was sufficiently proved, and the defence was allowed.² "Where such evidence is given, great attention will be paid to what is stated by the other party to the instrument."³

§ 379. *Right of plaintiff to enforce contract varied by parol.*—The parol variation may be alleged by the plaintiff in order to afford the defendant an opportunity to elect;⁴ or it may be set up by the defendant. If it be not alleged, but comes out in the evidence, or if it be alleged by the defendant, and be partially, but not fully, established to the satisfaction of the court, the court will direct an inquiry relative to it before disposing of the case.⁵ Whether the plaintiff is entitled to introduce parol evidence to correct a mistake in a written contract specific performance of which is sought by his bill, has been questioned.⁶ Such evidence has, however, frequently been admitted.⁷ The case of an additional consideration, which may be proved

¹ *Andrews v. Essex Ins. Co.*, 3 Mason, 6; *Harrington v. Harrington*, 2 How. Miss., 721; *Hall v. Claggett*, 2 Md. Ch., 51; *Philpott v. Elliott*, 4 Ib., 273; *Perry v. Pearson*, 1 Humph., 431; *Bailey v. Bailey*, 8 Ib., 230; *Adams v. Robertson*, 37 Ill., 45. Where a deed of real estate has remained undisputed for a number of years, an alleged misdescription in it, will not be corrected upon the testimony of witnesses as to conversations between the parties. *Durant v. Bacot*, 15 N. J. Eq., 411.

² *Wood v. Scarth*, 2 K. & J., 33.

³ *Kerr on Fraud and Mistake*, 416.

⁴ *Robinson v. Page*, 3 Russ, 114.

⁵ *Parken v. Whitby, T. & R.*, 366; *London & Birmingham R.R. Co. v. Winter, Cr. & Ph.*, 57; *Helsham v. Langley*, 1 Y. & C. C. C., 175; *Van v. Corpe*, 3 My. & K., 269; *Chambers v. Livermore*, 15 Mich., 289; *Berry v. Whitney*, 40 Ib., 65.

⁶ *Woolam v. Hearn*, 7 Ves., 211; *Higginson v. Clowes*, 15 Ib., 516; *Clinan v. Cooke*, 1 Sch. & Lef., 39.

⁷ *Henkle v. Royal Exch. Ass. Co.*, 1 Ves. Sen., 317; *Watts v. Bullas*, 1 P. Wms., 60; *Simpson v. Vaughan*, 2 Atk., 31; *Crosby v. Middleton*, Prec. in Ch., 309; *Burn v. Burn*, 3 Ves., 573; *South Sea Co. v. D'Olliffe*, cited 1 Ves., 317; 5 Ib., 601; *Randal v. Randal*, 2 P. Wms., 464; *Cocking v. Pratt*, 1 Ves. Sen., 400; *Rogers v. Earl, Dick.*, 294; *Barstow v. Kilvington*, 5 Ves., 593; *Gillespie v. Moon*, 2 Johns Ch., 585.

by parol when not inconsistent with the written instrument, is an instance in which a plaintiff may obtain specific performance of a contract with a parol variation. Thus, where there was an assignment of a farming lease and stock, and it was proved by parol that over and above the consideration stated in the deed, there was an agreement to pay the assignor forty pounds a year for his life, and to furnish him a house during the same time, and the assignment was carried into effect, specific performance of the parol agreement was granted at the suit of the annuitant.¹ In a suit for the specific performance of a contract for a lease, with the addition of a parol agreement to pay the defendant therefor two hundred pounds, the vice-chancellor held that the relief prayed for could not be granted, for the reason that the plaintiff himself showed that a material term had been left out of the contract. But the appellate court, in overruling this decision, held that a written contract in the absence of fraud and mistake, binds at law and in equity according to its terms, although there is an additional verbal agreement, subject to the right of the defendant to call on the court to be neutral, unless the plaintiff consents to the omitted term.² When, in reduc-

¹ Clifford v. Turrell, 1 Y. & C. C. C., 138. And see Rex v. Scammonden, 3 Term R., 474.

² Martin v. Pycroft, 2 De G. M. & G., 785. And see Robinson v. Page, *supra*. There is a *dictum* of Lord Hardwicke in Joynes v. Statham, 3 Atk., 388, expressing the opinion that evidence of the omission, in an agreement for a lease, of the words "clear of taxes," might have been given by the defendant, if he had as plaintiff sought a specific performance, considering it in the light of an explanation of an executory agreement, and not of a variation. See Walker v. Walker, 2 Atk., 98, and observations of Lord Redesdale, on both of these cases, in Clinan v. Cooke, 1 Sch. & Lef., 38, 39. Pember v. Mathers, 1 Bro. C. C., 52, which was a suit brought by lessees against their assignee for the specific performance of a parol agreement to indemnify the plaintiffs against all rents and covenants in the lease, and to execute a bond to secure such indemnity, though it was decided on the ground of fraud, came very near to holding the admissibility of parol evidence by the plaintiff to supply an omission in a written contract. The property was sold at auction, and the conditions of sale did not stipulate for the indemnity. The court, after an issue to ascertain the facts, granted specific performance, holding that where an objection is taken before the party executes the agreement, and the other side promise to rectify it, it is to be regarded a fraud on the party if such promise is not kept. Per Lord Thurlow. See remarks of Sir William Grant, in Clarke v. Grant, 14 Ves., 524; Harrison v. Gardner, 2 Mad., 198. In Marquis Townshend v. Stangroom, 6

ing a contract to writing, a mistake is committed by both parties, there is no good reason why the plaintiff should not have the contract corrected and enforced ; or, in other words, why the jurisdiction for the reform of contracts and for the execution of them, may not be exercised in one and the same suit ; since this would be the result, if the plaintiff were to sue for the specific performance of a written agreement, and then submit to a parol variation set up and proved by the defendant ; or if the plaintiff should file two bills, one for reform and the other for specific performance. But the weight of English authority is against the right of a party to maintain a suit for the specific performance of a contract with a parol variation.¹ In a suit for the specific performance of a contract for a lease with the addition of the words, "clear of all taxes," which it was proved was the meaning of the parties, it was held that the parol variation was inadmissible, and that only the written agreement should be enforced, which the plaintiff declining, the bill was dismissed. Lord Rosslyn said : "I cannot find that this court has ever taken upon itself, in executing a written agreement by a specific performance, to add to it by any circumstance that parol evidence could introduce."² So,

Ves., 328, which was a suit for specific performance with a parol variation, and in which the defendant by a cross bill sought the performance of the agreement as it stood, Lord Eldon used language which seemed to carry the idea that if the evidence had been different, the agreement might have been rectified and enforced. "I will not say," he observed, "that upon the evidence without the answer, I should not have had so much doubt whether I ought not to rectify the agreement upon which Stangroom relies, as to take more time to consider whether the bill should be dismissed."

¹ In cases analogous to specific performance, a writing has been reformed, and consequential relief afforded, in the same suit. Thus, a bond and deposit of deeds having been given to secure an advance, and it appearing that the bond by mistake was usurious, upon proof of the mistake, the bond was rectified, and the plaintiff held entitled to the same relief as an ordinary obligee and mortgagee. *Hodgkinson v. Wyatt*, 9 Beav., 566. So, a contract entered into between a solicitor and client for the payment of a certain sum in lieu of costs, was so erroneously drawn, as to the name and rights of the client, as, upon a strict construction, to deprive the solicitor of the benefit of the agreement. The solicitor accordingly brought a suit stating that he had no remedy at law, and praying that the contract might be rectified and an order made for the payment of the money pursuant to the agreement, the same as if, at the time of its execution, it had expressed the intention of the parties, which the court did. *Stedman v. Collett*, 17 Beav., 608.

² *Rich v. Jackson*, 6 Ves., 334, *n.* ; 4 Bro. C. C., 514.

where in a contract for the lease of a house at sixty pounds per annum, through inadvertence, or with some unfair view, seventy-three pounds and ten shillings were inserted as the rent, and the lessee brought a suit for the specific performance of the agreement rectified as to the amount of rent, evidence of the variation was rejected, and the bill dismissed, on the ground that though it would have been admissible for the plaintiff, if she had been defendant, yet it could not be used to procure a decree.¹ In another case, it was said: "It is a familiar doctrine in this court, that although to resist a specific performance, a defendant may show, by parol, that the written document does not represent the contract between the parties, yet a plaintiff cannot have a decree for a specific performance of a written contract with a variation upon parol evidence."² In the United States, this distinction between the right of the plaintiff and defendant to relief in case of mistake, has been objected to and disregarded by the highest authority, as artificial, and inconsistent with the general principles of equity; though some of the American courts have to a certain extent adhered to the English view. On the whole, however, it may now be considered as the established doctrine in this country, that when the plaintiff might maintain a suit for the reformation of a written contract, it is competent for him to introduce parol evidence of mistake, on a bill for specific performance.³

¹ Woolam v. Hearn, 7 Ves., 211; and see Higginson v. Clowes, 15 Ves., 516, 523; Winch v. Winchester, 1 V. & B., 375, 378; Clinan v. Cooke, 1 Sch. & Lef., 22, 38; Manser v. Back, 6 Hare, 447; Atty. Genl. v. Sitwell, 1 Y. & C. Ex., 559.

² Lord Cottenham in Squire v. Campbell, 1 My. & Cr., 480. And see London & Birmingham R.R. Co. v. Winter, Cr. & Ph., 57; Emmett v. Dewhurst, 3 M'N. & G., 587.

³ Keisselbrack v. Livingston, 4 Johns Ch., 144; Lyman v. United Ins. Co., 17 Johns, 377; Gouverneur v. Titus, 1 Edw. Ch., 477; Coles v. Brown, 10 Paige Ch., 535; Bellows v. Stone, 14 N. H., 175; Philpott v. Elliott, 4 Md. Ch., 273; Beardsley v. Knight, 10 Vt., 185; Wooden v. Haviland, 18 Conn., 101; White v. Port Huron R.R. Co., 13 Mich., 356. Some of the decisions accept the doctrine with the qualification that where the contract is within the statute of frauds, parol evidence, while it is admissible in behalf of the plaintiff to restrict the written instrument, cannot be received to enlarge or extend its operation: See Glass v. Hulbert, 102 Mass., 24; Osborne v. Phelps, 19 Conn., 62; Elder v. Elder, 10 Me., 80; Thomas v. McCormick, 9 Dana, 108; Whittaker v. Van Schoiack, 5 Oregon, 113.

In Keisselbrack v. Livingston *supra*, Chancellor Kent said: "Why could not

And, under the existing practice in several of the States, the plaintiff may unite, in the same suit, a claim for legal as well

the party aggrieved by a mistake in an agreement, have relief as well when he is plaintiff, as when he is defendant? It cannot make any difference in the reasonableness and justice of the remedy, whether the mistake were to the prejudice of the one party or the other. If the court be a competent jurisdiction to correct such a mistake (and that is a point understood and settled), the agreement, when corrected and made to speak the real sense of the parties, ought to be enforced as well as any other agreement perfect in the first instance. It ought to have the same efficacy, and be entitled to the same protection, when made accurate under the decree of the court, as when made accurate by the act of the parties." On the same subject, Mr. Story uses the following language: "It is, in effect, a declaration that parol evidence shall be admissible to correct a writing as against a plaintiff, but not in favor of a plaintiff seeking specific performance. There is therefore no mutuality or equality in the operation of the doctrine. The ground is very clear, that a court of equity ought not to enforce a contract, where there is a mistake, against the defendant insisting upon and establishing the mistake; for it would be inequitable and unconscientious. And if the mistake is vital to the contract, there is a like clear ground why equity should interfere at the instance of the party as plaintiff, and cancel it; and if the mistake is partial only, why, at his instance, it should reform it. In these cases, the remedial justice is equal; and the parol evidence to establish it, is equally open to both parties to use as proof. Why should not the party aggrieved by a mistake in an agreement, have relief in all cases, where he is plaintiff, as well as where he is defendant? Why should not parol evidence be equally admissible to establish mistake as the foundation of relief in each case? The rules of evidence ought certainly to work equally for the benefit of each party." "It may be added, that if the doctrine be founded upon the impropriety of admitting parol evidence to contradict a written agreement, that rule is not more broken in upon by the admission of it for the plaintiff, than it is by the admission of it for the defendant. If the doctrine had been confined to cases arising under the statute of frauds, it would, if not more intelligible, at least have been less inconvenient in practice. But it does not appear to have been thus restricted, although the cases in which it has been principally relied on, have been of that description. It will often be quite as unconscientious for a defendant to shelter himself under a defence of this sort, against a plaintiff seeking the specific performance of a contract and the correction of a mistake, as it will be to enforce a contract against a defendant which embodies a mistake to his prejudice." Story's Eq. Juris., Sec. 161, *note*.

In an early case in New York (*Gillespie v. Moon*, 2 Johns Ch., 585), a bill was filed to correct a mistake in a deed to the defendant, which, by an error in the description of the land, conveyed two hundred and fifty acres, instead of two hundred acres, parcel of the same. The mistake was denied in the answer; and it was objected that parol proof of the mistake was not admissible in contradiction of the deed, and especially in opposition to the defendant's answer. Chancellor Kent, in holding that the complainant was entitled to a decree, said: "I have looked into most, if not all, of the cases on this branch of equity jurisdiction, and it appears to me to be established, and on great and essential grounds of justice, that relief can be had against any deed or contract in writing, founded in mistake or fraud. The mistake may be shown by parol proof, and relief granted to the injured party, whether he sets up the mistake affirmatively by bill, or as a defence. It has been said that there was no instance of a mistake corrected in favor of a plaintiff, against the answer of the defendant denying the fact of the mistake; but I do not understand any *dicta* on this point to mean that the answer denying the mistake shuts out the parol proof, and renders relief unattainable, however strong the proof may be. The observations of Lord Eldon in the case of the Marquis of Townshend v. Stangroom, 6 Ves., 328, certainly imply no

as equitable relief.¹ Where the plaintiff sought to have a written contract reformed on the ground that, as alleged in the complaint, a material part of the agreement was

more than that the answer is entitled to weight in opposition to the parol proof; but it certainly can be overcome by such proof. In that very case, the answer denied the mistake, yet parol proof was held admissible. The lord chancellor only said that the evidence must be taken with due regard being had to the answer, and that it must not be forgotten to what extent the answer of one of the parties admits or denies the intention. Lord Thurlow said that there was so much difficulty in establishing the mistake to the entire satisfaction of the court, that it had never prevailed against the answer denying the mistake. I am not inclined, on light grounds, to contradict such high authority. But as I read the case of *Pitcairn v. Ogbourne*, 2 Ves., 375, before Sir John Savage, the bill was to be relieved against an annuity bond, and to reduce the sum from one hundred and fifty pounds, to one hundred pounds, according to the original understanding and agreement of the parties. The answer denied positively all the circumstances and every particular of the private agreement, and parol proof, by several witnesses, was objected to and admitted, which falsified the answer, and made out the real agreement to the satisfaction of the court; and though relief was not granted, it was refused upon other and distinct grounds no ways connected with the question as to the competency and effect of the proof."

¹ *Walker v. Sedgwick*, 8 Cal., 398; *Gray v. Dougherty*, 25 Ib., 266; *Lattin v. McCarty*, 41 N. Y., 107. In New York, under the code, when, in an action to recover real estate, plaintiff's claim is founded upon a legal title, the defendant may avail himself of an equitable right to defeat that title by way of defence in the suit. *Crary v. Goodman*, 12 N. Y., 266. An equitable defence may now be interposed as well in an action of ejectment as in any other form of proceeding, and the defendant may also claim in the same action any affirmative relief to which he shows himself to be entitled. *Bartlett v. Judd*, 21 N. Y., 200; *Cavall v. Allen*, 57 Ib., 508. In a suit on a policy of insurance to recover the amount of a loss by fire, and asking that in case it is deemed necessary to the recovery, that the policy may be reformed and corrected, it is erroneous to dismiss the complaint on the mere ground that the plaintiff has not entitled himself to the equitable relief demanded, if there be enough left of his case to entitle him to recover the sum for which he was insured. *N. Y. Ice Co. v. Northwestern Ins. Co.*, 23 N. Y., 357. Under the New York code there may be a joinder of legal and equitable causes of action. *Phillips v. Gorham*, 17 N. Y., 270. See *Caswell v. West*, 3 *Thomp. & Cook*, 383. In a suit for the reformation of a deed on the ground that a reservation of certain timber was omitted by mistake, and for an accounting by the defendant for timber removed from the premises, judgment was rendered for the plaintiff correcting the deed and for the value of the timber removed by the defendant. *Welles v. Yates*, 44 N. Y., 525. In *Lamb v. Buckmiller*, 17 N. Y., 620, *Roosevelt, J.*, in delivering the opinion of the court, said: "I shall assume, as has several times been decided, that legal and equitable relief may be asked for in one action, and that the plaintiff claiming under a defective deed, and showing sufficient grounds for its reform, may have the same remedy as if he had brought two actions, one to reform the instrument, the other to enforce it as reformed." In Kentucky, under the code, the defendant may rely upon equitable as well as legal defences. Either party may move to transfer an equitable issue presented by the pleadings to the equity docket. But if no such motion be made, the issue must be disposed of by the court before a judgment can be rendered for the plaintiff. *Petty v. Malier*, 15 B. Mon., 591. In Missouri, "A plaintiff may unite in the same petition several causes of action, whether they be legal or equitable, or both, if they arise out of the same transaction, and are connected with the same subject of action. But where causes of action are thus united, they must be separately stated, with the relief sought

omitted by mistake, and when reformed and made to express the agreement intended by the parties to it to have it enforced against the defendant, and that the defendant pay to the plaintiff a certain sum due on said contract, with interest, it was held that the case presented a single cause of action, and that it was a proper subject of equitable jurisdiction; the rule being, that the jurisdiction of equity having once attached, it shall be made effectual for the purposes of complete relief.¹ The doctrine of reformation and specific performance has been held to apply, whether the effect of the parol evidence be to abridge or extend the written instrument.² Where the defendant agreed in writ-

for in each cause of action. (Wagn. Stat. 1012, Sec. 2). Under this provision of the statute, the petition may embody a count in equity and a count at law, if they arise out of the same transaction and relate to the same subject matter. But they should be separately stated and intelligently distinguished, for they require separate trials and separate judgments. Their joinder in the same count would be fatally defective." *Henderson v. Dickey*, 50 Mo., 161, per Wagner, J. See *Jones v. Moore*, 42 Mo., 413. "There may be cases concerning real estate purely equitable in their character, where the court would possess the power to decree that the possession should be delivered up and surrendered. But it is improper to mingle a cause which is purely equitable with one that is strictly legal in the same count in a petition, and proceed to try them together before a chancellor. But it does not thence follow that, in all cases, a party must first get his decree for title, and then bring a separate and independent action in ejectment to obtain possession. An intimation of this kind was thrown out in *Peyton v. Rose*, 41 Mo., 257, which has been followed in subsequent cases, but we think the doctrine has been too broadly stated." *Henderson v. Dickey*, *supra*. In Minnesota, under the statute (Comp. St., Ch. 60, Sec. 87), the plaintiff may unite several causes of action in his complaint, whether legal or equitable, when they are included in the same transaction or transactions, and connected with the subject of the action. *Montgomery v. McEwen*, 7 Minn., 351; *Guernsey v. Am. Ins. Co.*, 17 Ib., 104.

¹ *Gooding v. M'Alister*, 9 How. Pr., 123. If in a suit for the specific performance of a parol agreement to convey real estate, the plaintiff fails to show that he is entitled to the equitable relief sought, he cannot have judgment for moneys advanced and personal services rendered under the agreement. *Horn v. Ludington*, 32 Wis., 73; *Supervisors of Kewaunee Co. v. Decker*, 30 Ib., 624. See *Lawe v. Hyde*, 39 Ib., 345.

² *Moale v. Buchanan*, 11 Gill & Johns, 314; *Leitensdorfer v. Delphy*, 15 Mo., 160; *Wright v. McCormick*, 22 Iowa, 545. But in Massachusetts it has been held that, in a suit for relief on the ground of mistake or fraud, in omitting from a conveyance of real estate a portion of the land verbally agreed to be conveyed, the plaintiff cannot compel a conveyance of such omitted part against a vendor denying the contract and setting up the statute of frauds; that the only remedy in such case would be a rescission of the entire contract; and that possession by the purchaser under such a deed is possession according to the title conveyed, and not such a possession as to afford ground for enforcing an alleged oral agreement to convey other land claimed to have been embraced in the same oral agreement with that conveyed. *Glass v. Hulbert*, 102 Mass., 24. "The prin-

ing to execute a lease "containing the usual clauses, restrictions, and reservations contained in the leases given by him," and it was insisted by the plaintiff that there was a mistake in the generality of the expression that the lease was to contain the "usual clauses," etc., it was held that parol evidence was admissible to show what was the understanding of the parties at the time of entering into the agreement.¹

§ 380. *Proof of mistake in written instrument.*—As the writing is usually the best evidence of the intention of the parties, when the reformation and enforcement of a contract is sought on the ground of mistake, the parol testimony must be clear and strong, and such as to leave no doubt of the mistake.² When the denial is direct and positive, the plaintiff must make out his case by satisfactory evidence outweighing the answer.³ It has been said that the

ciple on which courts of equity rectify an instrument so as to enlarge its operation, or to convey or enforce rights not found in the writing itself, and make it conform to the agreement as proved by parol evidence, on the ground of an omission by mutual mistake in the reduction of the agreement to writing, is, as we understand it, that in equity the previous agreement is held to subsist as a binding contract, notwithstanding the attempt to put it in writing." *Ibid.*, per Wells, J.

¹ Keisselbrack v. Livingston, *supra*. And see *Coutt v. Craig*, 2 Hen. & Munf., 618.

² *Henkle v. Royal Exch. Assurance Co.*, 1 Ves. Sen., 317; *Vouillon v. States*, 25 L. J. Ch., 875; *Godell v. Field*, 15 Vt., 448; *Harrison v. Howard*, 1 Ired. Eq., 407; *Huston v. Noble*, 4 J. J. Marsh, 130; *Anderson v. Bacon*, 1 Ib., 48; *Watkins v. Stockett*, 6 Har. & Johns, 435; *Lauderdale v. Hallock*, 7 Sm. & Marsh, 622; *Ross v. Wilson*, Ib., 753; *Planque v. Guesnon*, 15 La. An., 312; *Wurzbürger v. Meric*, 20 Ib., 415; *Bradford v. Union Bank of Tennessee*, 13 How., 57; *Guernsey v. Am. Ins. Co.*, 17 Minn., 104; *Hunter v. Bilyou*, 30 Ill., 228; *Selby v. Geines*, 12 Ib., 69; *Stine v. Sherk*, 1 Watts & Serg., 195; *Brady v. Parker*, 4 Ired. Eq., 430; *Kuckenbeiser v. Beckert*, 41 Ill., 172; *Cleary v. Babcock*, Ib., 271; *Mills v. Lockwood*, 42 Ib., 111; *McDonald v. Starkey*, Ib., 442; *McCloskey v. McCormick*, 44 Ib., 336; *Shively v. Welch*, 2 Oregon, 288; *Lyman v. United Ins. Co.*, 17 Johns, 373; *Sawyer v. Hovey*, 3 Allen, 331; *Tesson v. Atlantic Mu. Ins. Co.*, 40 Mo., 33. In *Marquis Townshend v. Stangroom*, 6 Ves., 333, Lord Eldon said that the proof must be the "strongest possible"; and Lord Thurlow, in *Shelburne v. Inchiquin*, 1 Bro. C. C., 338, that it must be strong and irrefragable. In *Gillespie v. Moon*, 2 Johns Ch., 585, Chancellor Kent, after reviewing all of the then authorities on the subject, says: "The cases concur in the strictness and difficulty of the proof."

³ *M'Mahon v. Spangler*, 4 Rand, 51; *Lyman v. United Ins. Co.*, 2 Johns Ch., 630; *Broadwell v. Broadwell*, 1 Gilman, 599. Formerly the court would not relieve against a mistake of fact, unless it was admitted by the defendant. But this is no longer required.

evidence required to prove a mistake when it is denied must be as satisfactory as if the mistake were admitted, and that the difficulty of doing this is so great, that there is no instance of its prevailing against a party insisting that there is no mistake.¹ But these and similar remarks of judges, however eminent, form no rule of law to direct courts in dispensing justice. When the mind of the court is entirely convinced upon any disputed question, it is its duty to act upon the conviction.² The court will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, and the subject matter of the contract, and all the provisions and expressions of the instrument. The court will also call in aid the acts done under the contract and deed, and contemporaneous writings made between the parties at or near the time when the deed was executed relating to the same subject matter.³ Where it is alleged that a deed purports to convey more land than the vendor owned, it may be proved that the vendee has all the land shown to him to be sold, and that if his deed comprises more, it is a mistake.⁴ If the plaintiff's proof be merely the recollection of witnesses, and there is no documentary evidence or corroborating circumstances, the denial of the defendant will leave the plaintiff without remedy.⁵ It is not enough to prove that witnesses understood the parties differently. It must be shown that the true intention of both parties was different, and that, by some mistake or fraud, such intention was not truly represented in the writing.⁶ When a deed is to be rectified by a writing in which there is a latent ambiguity, parol evidence is admissible to explain it.⁷

¹ Lord Thurlow in *Irnham v. Child*, 1 Bro. C. C., 92.

² Doubts of the court of review as to whether the evidence of an alleged mistake was sufficient, will not justify a reversal. *Clayton v. Freet*, 10 Ohio St., 544.

³ *Winnipisseogee Manf. Co. v. Perley*, 46 N. H., 83.

⁴ *Bowman v. Bittenbender*, 4 Watts, 290.

⁵ *Mortimer v. Shorhall*, 2 Dr. & W., 363, 374. But see *Pitcairn v. Ogbourne*, 2 Ves. Sen., 375.

⁶ *Coffing v. Taylor*, 16 Ill., 457.

⁷ *Murray v. Parker*, 19 Beav., 305.

§ 381. *Presumption of mistake.*—If an antecedent equity is clearly established in favor of the party seeking relief, and a legal right has been extinguished under circumstances which justify the inference of a mistake in fact, a court of equity will presume such mistake, and enforce the equitable claim to prevent manifest injustice and hardship. A. having given a mortgage on certain real estate owned by him, to B., for four thousand five hundred dollars, soon after died, leaving C. and D. his sole heirs at law. D. conveyed his interest in the land to C., the latter assuming the payment of the mortgage. C. then obtained from B. a loan of four hundred and thirty dollars, which, together with the mortgage debt and interest, made the sum of five thousand two hundred dollars; and for this amount, C. gave to B. his mortgage upon the same land. B. thereupon cancelled the mortgage given by A. Subsequently, the administrators of the estate of A. were proceeding to advertise and sell the land under an order of the surrogate for the payment of the debts of the intestate, when B. filed a bill for an injunction restraining them, and seeking to have the land sold and the proceeds applied in payment of his mortgage debt, which was decreed.¹

§ 382. *Mistake how to be alleged.*—Where the bill seeks to reform a written instrument on the ground of mistake, there must be an express averment that the instrument, as existing, differs from the intention of the parties, stating the particulars, and concluding with a prayer for the correction of the mistake, and for a decree in accordance with the reformed instrument.² When the complainant wishes to introduce parol evidence to correct a written instrument, he should not merely state the agreement as it ought to have been reduced to writing, but he should also state the substance of the written agreement, and show wherein it differs from the one actually made; so that if the al-

¹ Hyde v. Tanner, 1 Barb., 75.

² U. S. v. Munroe, 5 Mason, 572; Wesley v. Thomas, 6 Har. & Johns, 24.

leged mistake is denied in the answer, the testimony may be directed to the question whether a mistake has or has not occurred in reducing the agreement to writing. The party alleging a mistake in such a case, holds the affirmative; and he must satisfy the court beyond all reasonable doubt that such an agreement as he claims to have been made was in fact made between the parties, and that, either by fraud or accident, a mistake has occurred in reducing the actual agreement to writing.¹

§ 383. *Assent of plaintiff to agreement varied by parol.*—Where the defendant sets up a parol variation in defence to a bill for the specific performance of a written contract, if the plaintiff assents thereto, he may in general amend his bill, and have a specific performance of the written contract with the variation so set up; for under such circumstances there is a written admission of each party to the parol variation.² It will depend, however, upon the circumstances of each case whether the court will dismiss the bill, or enforce the contract taking care that the subject matter of the parol agreement or understanding is carried into effect.³ If the plaintiff has attempted in the first instance to commit a fraud, or if the claim is wholly inequitable, or there has been great *laches*, the court may, upon the fact of the omission of part of the contract being shown, dismiss the bill, notwithstanding the plaintiff offers to take his order for specific performance of the contract, as modified, by supplying its omissions.⁴ Upon a bill for the specific performance of a contract in writing for the lease of two stores to the defendant for a specified sum, it appeared that in drafting the contract one of the stores was omitted, so that the contract, as written, purported to be

¹ *Coles v. Bowne*, 10 Paige Ch., 526.

² *Story's Eq. Juris.*, Sec. 770, *a*; *Marquis Townshend v. Stangroom*, 6 Ves., 328; *Ramsbottom v. Gosden*, 1 Ves. & B., 165; *Gordon v. Hertford*, 2 Mad., 106; *Clarke v. Moore*, 1 J. & L. 723. But see *Park v. Johnson*, 4 Allen, 259.

³ *London & Birmingham R.R. v. Winter*, 1 Cr. & Ph., 57.

⁴ *Garrard v. Grinling*, 2 Swanst., 244.

an agreement to lease one store only for the sum fixed as the rent of both stores. The defendant having proved by parol the real contract, the plaintiff offered to take his decree upon that. The chancellor, in dismissing the bill, said: "If he attempts to perpetrate a fraud and fails, I shall take care that he fails altogether."¹

§ 384. *Where correction of mistake would impair a right.*—A transaction will not be relieved against on the ground of mistake without regard being had by the court to the just equities between the parties. If the parties cannot be restored, with reference to their rights, to the situation they occupied previous to the transaction, or if the mistake cannot be corrected without impairing the rights of innocent third persons who had no knowledge of the mistake when their rights were acquired, a court of equity will withhold its aid.²

§ 385. *Lapse of time.*—There is no rule of law which determines the time within which a person may discover that a writing does not express the contract which he supposed it to contain, and which bars him of relief for delay in asserting his rights, short of the period fixed by the statute of limitations. But lapse of time without objection is a circumstance to be weighed by the court as bearing

¹ Molloy v. Eagan, 7 Ir. Eq., 590.

² M'Alpine v. Swift, 1 Ba. & Be., 293; Dacre v. Georges, 2 Sim. & Stu., 454; Malden v. Menill, 2 Atk., 8; Warrick v. Warrick, 3 Ib., 293; Clifton v. Cockburn, 2 M. & K., 76; Blackie v. Clark, 15 Beav., 595; Bateman v. Boynton, L. R. 1, Ch. 359. But see Oxwick v. Brockett, 1 Eq. Ca. Ab., 355. "There are few cases in which equity will insist on the maxim that he who seeks equity must do it, with more rigor than in those of suits for specific performance." Leading Cases in Eq., Vol. 2, p. 550. And it makes no difference whether the inequitable circumstances arose prior or subsequent to the date of the contract sought to be enforced. Perkins v. Wright, 3 Har. & McHen., 326. The vendor of land, the purchase money remaining unpaid, recovered judgment at law for the same against the vendee in possession, and, under an execution, sold the land, became the purchaser for an amount less than the purchase money, took a deed from the sheriff, and went into possession. The original vendee then tendered the amount due on the contract, after deducting the amount ostensibly made by the sheriff's sale, and filed a petition for a specific performance of the contract of sale. It was held that on this state of facts the petitioner was not entitled to a decree; but that if he had averred a willingness to pay the full amount of the purchase money due after deducting therefrom the rents, issues, and profits of the land while held by the defendant, a different case would have been presented. Huntington v. Rogers, 9 Ohio St., 511.

upon the truth of the complainant's allegation that the written instrument is not conformable to the agreement of the parties.¹

§ 386. *Parol waiver of contract.*—An executory written agreement not under seal may, before breach, be discharged and abandoned, or waived, by a subsequent unwritten agreement, as well where the original contract is required by the statute of frauds to be in writing, as where a writing is unnecessary.² But when the agreement to rescind rests only in parol, it must be shown by acts accompanying the rescission which leave no doubt of the intent, such as cancelling the contract, or removing from the possession.³ The declarations of a vendee, who continued in possession, that he would throw up his contract and thereafter hold as tenant to his vendor, would not divest his interest.⁴ Where it was verbally agreed to rescind a contract of sale, and to submit the matter in controversy to arbitrators, who awarded a rescission, it was held a good defence to a suit brought by the vendor for specific performance.⁵ But where it was verbally agreed to rescind a bond to convey land, and the bond for title and a note given for the balance of the purchase money were left with a third person, to be handed over to the parties entitled thereto when the money already paid by the purchaser was refunded, it was held that the agreement to rescind remained executory, and not

¹ *Phoenix Ins. Co. v. Gurnee*, 1 Paige Ch., 278; *Bidwell v. Astor Mu. Ins. Co.*, 16 N. Y., 263.

² *Buell v. Miller*, 4 N. H., 196; *Botsford v. Burr*, 2 Johns Ch., 405; *Tolson v. Tolson*, 10 Mo., 736; *Buckhouse v. Crosby*, 2 Eq. Cas. Ab., 32; *Goucher v. Martin*, 9 Watts, 106; *Boyce v. McCulloch*, 3 Watts & Serg., 429; *Phil. Ev.*, 444. A policy of insurance provided that if the premises were vacant at the time of insuring, or became so during the life of the policy, without the company's consent indorsed thereon, the insurance should be void. This condition was printed in very small type, and was not discovered by the owner of the property until the day after his house was burned. It having been proved that the agent of the insurance company, at the time he issued the policy, knew that the house was vacant, it was held that the indorsement was waived, and that the owner was entitled to a reformation of the policy in this respect, and to equitable relief suitable to the case. *Cone v. Niagara Fire Ins. Co.*, 3 Thomp. & Cook, 33; *Affid.* 60 N. Y., 619.

³ *Laner v. Lee*, 42 Pa. St., 165.

⁴ *Bowser v. Cravener*, 56 Pa. St., 132.

⁵ *England v. Jackson*, 3 Humph., 584.

a defence to a bill for specific performance until the money advanced was repaid.¹

§ 387. *Mistake in execution of power.*—A court of equity, on the ground of accident or mistake, will relieve against the defective execution of a power, or a contract amounting to such defective execution, in behalf of a *bona fide* purchaser for a valuable consideration, a creditor, a charity, wife, or child, where there is not a strict compliance with the formalities required by the power;² but not, if the defect be in the substance of the power, interference with which would defeat the intention of the donor;³ nor where there has been no exercise of the power, but a mere parol promise or agreement to execute;⁴ nor if there is some counter equity.⁵ The defect may consist of informality in the instrument;⁶ or in the execution of an instrument which is, in itself, appropriate.⁷ A power created by statute, will be construed more strictly, than if created by a private person.⁸ Although, as a rule, a court of equity will not grant relief in case of the non-execution of a power, yet it will do so when the execution of the power has been prevented by fraud.⁹ Equity will not interfere in aid of the execution of a power, when the intention of the person creating the power will thereby be defeated; as where a power which should have been executed by will, has been executed by deed.¹⁰

¹ Walker v. Wheatly, 2 Humph., 119.

² Chapman v. Gibson, 3 Bro. C. C., 229; Shannon v. Bradstreet, 1 Sch. & Lef., 63; Sayer v. Sayer, 7 Hare, 377; Hughes v. Wells, 9 Ib., 769; Affleck v. Affleck, 3 Sm. & G., 394; Harvey v. Harvey, 1 Atk., 567; Medwin v. Sandham, 3 Swanst., 686; Proby v. Landor, 28 Beav., 504; Moodie v. Reid, 1 Mad., 516; Lippincott v. Stokes, 2 Halst. Ch., 122; Howard v. Carpenter, 11 Md., 259; Mitchell v. Denson, 29 Ala., 327; Lines v. Darden, 5 Fla., 51.

³ Lawrenson v. Butler, 1 Sch. & Lef., 13.

⁴ Tollet v. Tollet, 2 P. Wms., 489; Shannon v. Bradstreet, *supra*; Barr v. Hatch, 3 Ohio, 527; Mitchell v. Denson, *supra*.

⁵ 1 Fonbl. Eq., B. 1, Ch. 1, Sec. 7, note V.

⁶ Garth v. Townsend, L. R., 7, Eq. 220. ⁷ Morse v. Martin, 34 Beav., 500.

⁸ 1 Fonbl. Eq., B. 1, Ch. 1, Sec. 7, note T; Curtis v. Perry, 6 Ves., 739; Me-taer v. Gillespie, 11 Ib., 621; Thompson v. Pulteney, Coop., 276; Bright v. Boyd, 1 Story, 478; McBride v. Wilkinson, 29 Ala., 662.

⁹ 1 Fonbl. Eq., B. 1, Ch. 1, Sec. 7.

¹⁰ Reid v. Shergold, 10 Ves., 378; Kerr on Fraud and Mistake, 442.

§ 388. *Correction of award.*—A court of equity will correct a mistake in an award, when the mistake appears on the face of the award, or is disclosed by some contemporaneous writing, or if the arbitrator voluntarily admit a mistake, or state circumstances which show clearly that the proceedings have been erroneous;¹ but not an error in judgment on the merits.²

¹ Kerr on Fraud and Mistake, 446-448; Ryan v. Blunt, 1 Dev. Eq., 382; Pleasants v. Ross, 1 Wash. Va., 156; Bumpass v. Webb, 4 Porter, 65; Taylor v. Nicholson, 1 Hen. & Munf., 67; Wheatley v. Martin, 6 Leigh, 62.

² Head v. Muir, 3 Rand, 122; Radcliffe v. Wightman, 1 McCord Ch., 408; Rudd v. Jones, 4 Dana, 229; Van Cortland v. Underhill, 17 Johns, 405; Hurst v. Hurst, 2 Wash. C. C., 127; Burchell v. Marsh, 17 How., 344; Cromwell v. Owings, 6 Har. & Johns, 10; Boston Water Power Co. v. Gray, 6 Metc., 131.

CHAPTER XI.

INABILITY OF COURT TO ENFORCE PART OF CONTRACT.

- 389. Entire contract to be enforced.
- 390. In case of acts to be done by plaintiff in the future.
- 391. Effect of executing deed or obligation.
- 392. Contract to be enforced on both sides.
- 393. Divisibility of contract how determined.
- 394. When contract deemed entire.
- 395. Entirety of contract how proved.
- 396. When contract regarded as divisible.
- 397. In case of distinct right.
- 398. Contract enforced notwithstanding an act connected with it is to be done in the future.
- 399. In case of default of party objecting, or where performance of part is honorary or optional.

§ 389. *Agreement to be enforced entire.*— Specific performance will not, in general, be decreed, unless the court can enforce the whole contract. If parties seek to enforce a trust created under a contract, their right to the relief demanded is founded on the contract itself, and they cannot claim the benefit of such portions of it as are to their advantage, and repudiate the rest.¹ Where a contract of partnership for a term of years did not specify the amount of the capital, or the manner in which it was to be provided, it was held that, as the court could not enforce the contract in its entirety, it would not enforce it in part by decreeing, in behalf of the representatives of a deceased partner, a dissolution of the partnership and the sale of the partnership effects.² Where part of an award was capable, and the other part incapable, of being specifically enforced,

¹ *Pujol v. McKinlay*, 42 Cal., 559. Where land with the fixtures and personal property thereon is conveyed in trust to secure the payment of a debt, and the creditors are obliged to resort to a court of equity to save the personal property and fixtures from destruction, and the application of the proceeds to the payment of the debt, the court will take jurisdiction of the whole subject matter of litigation, and also decree a sale of the land. *Kraft v. De Forest*, 53 Cal., 656.

² *Downs v. Collins*, 6 Hare, 418.

the court refused to interfere.¹ A person having agreed to construct certain works which the court could not superintend, and to give a bond for the performance of the contract, as the court could not enforce the construction of the works, it refused to compel the execution of the bond, which would have been but a part performance of the contract, and the stipulation as to the works was the substance of the agreement; while that as to the bond was only incidental.²

§ 390. *Stipulation as to future acts.*—When the consideration on the part of the plaintiff is the doing of something in the future which the court cannot compel, specific performance of the contract will be refused.³ A decree was denied for the specific performance of a contract to straighten a crooked river which separated the lands of the parties, they having stipulated for mutual compensation for the soil which might be changed from one to the other, and in relation to contingent damages. The chancellor said: “As far as the merits of the case go, I would decree the specific performance of this contract; but I do not see how it is possible. If I execute it at all, I must execute it *in toto*; and how can I execute it prospectively? The court acts only on the principle of executing it *in specie*, and in the very terms in which it has been made. Therefore, when you come to the specific execution of a contract containing many particulars, you must see that it is possible to execute it effectively. The court cannot say that when an event arises hereafter, it will then execute it. In the case of a decree for the execution of a contract for the sale of timber, it is no objection that it is to be cut at intervals. That is certain, and there, mere delay will not prevent the court from executing it. There, the agreement is executed in *specie*. The court decrees to one, the very

¹ Nickels v. Hancock, 7 De G. M. & G., 300. And see Vansittart v. Vansittart, 4 K. & J., 62.

² South Wales R.R. Co. v. Wythes, 1 K. & J., 186; 5 De G. M. & G., 880.

³ Waring v. Manchester, Sheffield & Lincolnshire R.R. Co., 7 Hare, 482.

timber contracted for; to the other, the very price. If I am called on now to execute the agreement, I can only specifically execute a portion. Whereas, I am bound to execute all. No precedent has been cited. But indeed none is necessary. It is a question of principle; and I am clearly of opinion that if I gave a decree now, it would not be a specific execution of the contract, but only a declaration that there ought to be a specific execution of it hereafter. I must therefore leave the plaintiff to his remedy at law.”¹ Plaintiffs agreed with a railroad company to supply and lay down the rails, and erect the needful bridges, for which they were to be paid in the bonds and stock of the company. The road-bed not being ready for the iron, nor the whole of the route located, the plaintiffs had not performed their part of the contract. A demurrer to the bill, which was filed to compel specific performance by the company of their contract, and to restrain them from entering into a similar contract with others, was sustained.² Where an owner of patents contracted with certain persons to form with himself a company, to which he was to give his services for two years, and do his utmost to improve the invention for the benefit of the concern, and these persons refused to go forward with the company, and the patentee brought a suit for specific performance of the agreement, it was held, on demurrer, that, as the court could not enforce against the plaintiff the stipulations on his part, he could not maintain a bill for performance; and further, that the court could not enforce the contract by directing the parties to execute a deed, the agreement being to do certain acts, and not to execute covenants to do them.³

§ 391. *Enforcing contract by execution of deed.*—Where a party contracts to do something in the future, without agreeing to execute a deed to secure its performance, the execution of such a deed is no performance of the stipula-

¹ Gervais v. Edwards, 2 Dr. & W., 80.

² Fallon v. R.R. Co., 1 Dillon, 121.

³ Stocker v. Wedderburn, 3 K. & J., 393.

tion. And the same is true where, though it is agreed to give a deed or obligation, that is not of the substance of the agreement, but merely incidental. Thus, where there was a contract to construct a branch railway, which the court could not enforce, and also to give a bond to secure performance, the court refused to decree the execution of the bond.¹ But if it be agreed to do a thing and to execute a deed for that purpose, and the deed embraces the executory part of the contract, the agreement will be enforced by compelling the execution of the deed, notwithstanding what is to be performed is future, and to be done from time to time.²

§ 392. *Agreement to be enforced in respect to both parties.*—Specific performance will not be decreed unless the court can, at the time, enforce the contract on both sides; or, at all events, such part of it as the court can ever be called upon to enforce. Thus, A. and B., two adjoining land holders, entered into a contract to change the course of a stream, agreeing that if any damage should accrue to the land of B. from a dam which was to be built, A. should recompense him in land, the quantity to be ascertained by arbitrators. As the court could not enforce the terms of the contract at once *in proesenti*, and the whole agreement be carried into effect, it refused to interfere.³ This principle is applied to marriage contracts as well as other agreements, though it has been urged that when the court specifically executes a settlement, its interference should be confined to limitations in favor of purchasers, and not be extended to volunteers. “There is no instance of decreeing a partial performance of articles. The court must decree all or none. And where some parts have appeared very unreasonable, the court have said, we will not do that, and, therefore, as we must decree all or none, the bill has been dismissed.”⁴

¹ South Wales R.R. Co. v. Wythes, *supra*.

² Granville v. Betts, 19 L. J. Ch., 32.

³ Gervais v. Edwards, *supra*.

⁴ Lord Hardwicke, in Goring v. Nash, 3 Atk., 190. See Davenport v. Bishop, 2 Y. & C. C. C., 451; S. C., 1 Phil., 698.

§ 393. *Determining nature of contract.*—The question sometimes arises whether a contract is entire or divisible; or, in other words, what constitutes the whole contract. This is a matter of construction, depending upon the intention of the parties, as gathered from the language used and the subject of the agreement.¹

§ 394. *When contract entire.*—A contract for the sale of property in one lot will in general be regarded as not divisible. Accordingly, where two undivided sevenths of land were sold in this way, and a good title could only be made to one seventh, specific performance was refused.² And the purchaser of the whole of certain real estate cannot be compelled to take six undivided sevenths. So, where two tenants in common of land entered into a contract with the plaintiff to lease to him the coal under it, and the contract could not be proved against one of the owners, the suit was dismissed against the other, as he had not agreed to lease one share only; though it would have been different if he had held himself out and contracted as the owner of the whole.³ A contract to grade a section of a railroad line, and to prepare the road-bed for the cross-ties and iron, in consideration of a specified sum to be paid from time to time as the work progresses, according to the estimates of an engineer, is entire.⁴ S. entered into a contract with a municipal corporation to furnish the materials for, and construct, a sewer, under the direction, and to the satisfaction, of the city surveyor; the work to be completed on or before the 15th of October, at a specified price a running foot. The work was not finished until the 14th of November. It was held that the contract was entire.⁵ A contract to deliver a given number of tons of coal at a cer-

¹ *More v. Bonnet*, 40 Cal., 251; *Southwell v. Beezley*, 5 Oregon, 458. See *Huey v. Grinnell*, 50 Ill., 179.

² *Roffey v. Shatcross*, 2 Bro. C. C., 118, *n.*; *S. C.*, *Roffey v. Shollcross*, 4 Mad., 227.

³ *Price v. Griffith*, 1 De G. M. & G., 80.

⁴ *Cox v. Western Pacific R.R. Co.*, 44 Cal., 18.

⁵ *Coburn v. City of Hartford*, 38 Conn., 290.

tain price per ton on board vessels during a time stated, is entire, and the purchaser is not bound to pay for any of the coal until the whole is delivered.' The contract may be entire, notwithstanding the same kind of property is bought at different prices. An agreement for the sale of two bales of cotton when picked and ginned, one bale for eighty cents a pound in Tennessee currency, and the other for sixty cents a pound in greenbacks, is an entire contract, and the seller is not bound to deliver either bale until paid for both.² The same may be the case where the property purchased consists of several kinds, at different prices: as goods in a ship;³ or land sold at one price, and the timber growing on it at another.⁴

§ 395. *Evidence of entirety of contract.*—A party may prove, from the nature of the contract or of the property, or other special circumstances known to both parties, that the transaction was entire, forming one contract, although there be no express statement to that effect.⁵ So the par-

¹ Shinn v. Bodine, 60 Pa. St., 182.

² Parker v. Bergan, 4 Heiskell, 590. Two pieces of land having been purchased by an individual from the same persons, the consideration for one of which was seven hundred pounds, and for the other three hundred pounds, both of which were conveyed by a single deed, and the purchaser subsequently evicted from the latter piece, he brought an action for money had and received to recover the three hundred pounds he had paid, at the same time refusing to give up the parcel of land for which he had paid seven hundred pounds, and it was held that he was entitled to recover. Lord Alvanley, Ch. J., said: "If the question were how far the particular part of which the title has failed formed an essential ingredient of the bargain, the grossest injustice would ensue if a party were suffered in a court of law to say that he would retain all of which the title was good, and recover a proportionable part of the purchase money for the rest. Possibly the part which he retains might not have been sold unless the other part had been taken at the same time, and ought not to be valued in proportion to its extent, but according to the various circumstances connected with it. But a court of equity may inquire into all the circumstances, and may ascertain how far one part of the bargain formed a material ground for the rest, and may award a compensation according to the real state of the transaction. In this case, however, no such question arises; for it appears to me that, although both pieces of ground were bargained for at the same time, we must consider the bargain as consisting of two distinct contracts, and that the one part was sold for three hundred pounds and the other for seven hundred pounds. It has not been suggested that they were necessary to the occupation of each other." Johnson v. Johnson, 3 Bosanquet & Puller, 162.

³ Baldey v. Parker, 2 B. & C., 37.

⁴ Crosse v. Lawrence, 9 Hare, 462; Crosse v. Keene, Ib., 467.

⁵ Casamajor v. Strode, 2 M. & K., 722; Poole v. Shergold, 2 Bro. C. C., 118.

ties may convert separate contracts into one, by agreeing for the sale of several lots for a given sum. Accordingly, where a person bought at auction three lots of one hundred shares each, and afterward received the shares, paid for them, and took a bill of sale describing the transaction as a sale of three hundred shares, it was held that, although as each lot was knocked down there was a distinct contract for the sale of one hundred shares, yet that the subsequent dealing proved that the parties regarded the transaction as one entire sale of three hundred shares.¹

§ 396. *Divisible contract*.—If property consists of distinct parts of different quality—as a ship and the freight—the contract may be divisible, notwithstanding it is all included in one writing, and an entire sum is named.² Where a number of articles are bought at the same time, and a separate price agreed on for each, although they are included in one instrument or conveyance, yet the contract, for sufficient cause, may be rescinded as to part, the price paid be recovered back, and the contract be enforced as to the residue; because, in effect, there is a separate contract for each separate article.³ At law, when property is sold in separate lots, there is a distinct contract for each lot, and the buyer has a right of action after he has completed the purchase of one lot.⁴ The same is *prima facie* the case

¹ Franklyn v. Lamond, 4 C. B., 637.

² Mestaer v. Gillespie, 11 Ves., 621, 629.

³ Miner v. Bradley, 22 Pick., 45.

⁴ Robinson v. Green, 3 Metc., 159, was an action brought by the plaintiff, as auctioneer, for services in selling sundry lots of standing wood which was in two counties, the defence being that the contract was entire, and the consideration, as to part, illegal. The court, per Shaw, C. J., said: "The plaintiff does not claim on an entire contract. The sale of each lot is a distinct contract. The plaintiff's claim for a compensation arises upon each several sale, and is complete on such sale. If there were an express promise to pay him a fixed sum as a compensation for the entire sale, it would have presented a different question. Where an entire promise is made on one entire consideration, and part of that consideration is illegal, it may avoid the entire contract. But here is no evidence of a promise of one entire sum for the whole service. It is the ordinary case of an auctioneer's commission which accrues upon each entire and complete sale. We do not see how the question can be answered which was put in the argument, namely: Supposing the plaintiff had stopped, after selling the two lots lying in South Reading, which it was lawful for him to sell, would he not have been entitled to his commission? If he would, we do not

in equity, in which, as a rule, a vendor may compel the purchaser of two lots to complete his purchase of one, though he be not able to make a title to the other.¹ Where, by the same agreement, A. agreed to sell land to B., and B. contracted to sell certain other land to A., the transaction was held to constitute two independent contracts.² But cross contracts for the sale of goods were held to be dependent.³ Where a party agreed to furnish

perceive how his claim can be avoided by showing that he did something else on the same day which was not *malum in se*, but an act prohibited by law on considerations of public policy. The court are of opinion that the plaintiff's claim for a *quantum meruit* may be apportioned, and that he is entitled to recover for his services in the sale of the two lots."

¹ Lewin v. Guest, 1 Russ., 325. And see Buckmaster v. Harrop, 7 Ves., 341; 13 Ib., 456.

² Croome v. Lediard, 2 M. & K., 251.

³ Atkinson v. Smith, 14 M. & W., 695. In *McDaniels v. Whitney*, 38 Iowa, 60, the court were equally divided in opinion with reference to the following: "Proposition made by me to Mr. McDaniels: I hereby agree to give up the banking business in Atlantic to Mr. McDaniels, and the best lot he can pick now in our town, providing he will now build upon the same, and become a permanent resident of our county, and take sixteen dollars and fifty cents per acre for the farm of three hundred and seventy-one acres in sections 33, 34, and 28, of township 77, 36 as marked blue on his plat, and give up to said McDaniels my chance of purchasing the two forty-acre lots of which Judge Temple is acting as agent. This proposition is not a standing one, but to be decided within two days from date." Beck, Ch. J., and Day, J., held that the foregoing constituted two distinct contracts, one of which might be specifically enforced without the other, while Miller and Cole, Js., maintained that it was one entire contract. The latter said: "The proposition, while single in itself, yet contains an agreement on the part of Whitney to do four things, each of which is separated from the preceding only by a comma, and is connected with the preceding by the copulative conjunction and. Mr. Whitney by his proposition says: I hereby agree to give up the banking business in Atlanta to Mr. McDaniels, and the best lot he can pick now in our town, and take sixteen dollars and fifty cents per acre for the farm of three hundred and seventy-one acres, and give up to said McDaniels my chance of purchasing the two forty-acre lots. There is no division of this proposition into sentences, nor any specification of the consideration the proposer is to receive for each of the four things he proposes to do. The price per acre for the land is specified. But whether such price is above or below its real or market value does not appear, either in the proposition itself or in the evidence in the case. It may have been much above its value, and, in the contemplation of the parties, equalized by the chance of getting the two forty-acre tracts. Or, it may have been much below its value, and, in the estimation of the parties, compensated for by taking the banking business with its burdens of doubtful securities. At all events, there is nothing in the proposition itself which specifies the consideration to be paid to the proposer for each of the four things he agrees to do, nor for any one of them. The proposition further shows that it was not binding at once, and in any event, upon the proposer Whitney. But it was to be, and would become, binding upon him only when it should be accepted by McDaniels. What was McDaniels to do in order to accept it and make it binding upon Whitney? He was to pick the best lot, and to build upon it, and take the banking business,

the materials for, and do the carpenter work on, two brick buildings then in process of erection for a specified sum, and to turn the buildings over when complete, and they were accidentally destroyed by fire, it was held that the contract was divisible, and that he was entitled to recover for materials furnished and work done.¹ If a contract is divisible, and a part which is legal can be separated from that which is illegal, the contract may be enforced as to the former.² Two signatures by the same person to a subscription paper, one in his individual name, and the other with the addition of executor, are separate contracts.³

§ 397. *Performance in relation to distinct right.*—An exception to the rule that the court will not enforce part of a contract, arises, where, although there cannot be a decree as to terms of the contract relating to the future, yet the plaintiff, at the time of bringing the suit, has a distinct right as to what has already transpired. Thus, where a contract having been entered into for the construction of a railroad, the contractors filed a bill against the railroad company in which it was alleged that the engineer fraudulently withheld certificates for labor performed, and seeking an account for work done, it was held, on demurrer, that, although the work was not finished, and the court could not compel its completion, yet as, by the alleged acts of the defendants, the plaintiffs had been deprived of a right perfect in itself, they were entitled to relief as to that.⁴ So, if

and become a permanent resident of the county, and pay sixteen dollars and fifty cents per acre for the farm, and take the chance of purchasing the two forty-acre lots. He was to do all of these before Whitney would become bound to him to do what he had proposed. McDaniels could not elect to take the banking business alone, and require Whitney to give it up. This is too clear to require demonstration. And if he could not do this, it is just as clear that he could not require Whitney to do any other one of the several things proposed, without himself doing all he was required to do by the proposition. And from this it must appear that the contract is no more divisible into two parts than into four."

¹ Hollis v. Chapman, 36 Texas, 1.

² Arnot v. Pittston & Elmira Coal Co., 5 Thomp. & Cook, 143; 2 Hun., 591.

³ Erie & N. Y. City R.R. Co. v. Patrick, 2 Abb. App. Decis., 72.

⁴ Waring v. Manchester, Sheffield & Lincolnshire R.R. Co., 7 Hare, 482.

articles of partnership provide that the accounts shall be made up semi-annually, and that one of the members of the firm shall have a salary graduated according to the profits thus ascertained, he may from time to time bring a suit to compel an accounting pursuant to the agreement, although the other terms of the contract might be incapable of specific performance.¹

§ 398. *Enforcing one of several stipulations.*—Specific performance may be granted of a contract which can be enforced, notwithstanding something in relation to the subject matter is to be done afterward; as an agreement for the sale of timber, to be cut down at a subsequent time, and the purchase money to be paid by instalments.² Where a railroad company agreed to make and maintain a siding so long as it should be of use, it was held that the first part of the stipulation might be enforced, the question of maintaining the siding, being a matter which could be inquired into when that part of the agreement was violated.³

§ 399. *Where party is in default or stipulation is partly honorary, or in the alternative.*—It has been seen,⁴ that, although where the vendor has only part of the interest he has contracted to sell, he cannot compel specific performance by the purchaser, yet that the latter may enforce the contract against the former to the extent of the vendor's ability to convey, with compensation for the deficiency. So, the court will be reluctant to refuse to enforce a contract, a part of which cannot be carried out in consequence of the default of the party who sets up this defence. Three railroad companies entered into a contract for a purchase and amalgamation. For the amalgamation, an act of Parliament was necessary, which could not be obtained, because a majority of the stockholders of one of the companies was opposed to the arrangement. In a suit relating to the pur-

¹ Ibid., 496, per Wigram, V. C.

² Gervais v. Edwards, 2 Dr. & W., 80.

³ Lytton v. Gt. Northern R.R. Co., 2 K. & J., 394.

⁴ *Ante*, § 203. And see *post*, § 505.

chase, the last mentioned company interposed as a defence, the impossibility of carrying out the agreement as to the amalgamation. The court overruled the demurrer, and doubted whether the defendant company could say to the plaintiffs that they were not entitled to the benefit of such part of the contract as the defendants could perform, because the latter could not without a special act perform the whole, when they declined to apply to Parliament to give them the necessary powers.¹ When a contract contains stipulations on the part of the defendant which can be enforced, while other stipulations, which are wholly on the plaintiff's part, cannot be enforced, the court has no difficulty in granting an injunction; because, as soon as the plaintiff fails to perform his part of the agreement, the injunction will be dissolved.² If two persons enter into an agreement which is partly legal, and partly honorary, the court, in the absence of any other objection, will specifically enforce the legal contract, and leave the honorary part with the conscience of the parties.³ Where a contract is in the alternative, so that the parts are independent, specific performance may be granted of one part. Thus, in an agreement to grant a lease, an option to the lessee to purchase, was held so far independent of the agreement for a lease, that the neglect of the lessee to insure, which would have prevented his suing for a lease, did not prevent his suing on the option to purchase.⁴

¹ *Gt. Western R.R. Co. v. Birmingham & Oxford Junction R.R. Co.*, 2 Phil., 597, 605; *Fry on Specif. Perform.*, 244. See *Woodcock v. Bennett*, 1 Cowen, 711; *Gupton v. Gupton*, 47 Mo., 37; *Smith v. Kelly*, 56 Me., 64.

² *Stocker v. Wedderburn*, 3 K. & J., 393, 405.

³ *Corolan v. Brabazon*, 3 Jon. & L., 200, 213.

⁴ *Green v. Low*, 22 Beav., 625. See *Hope v. Hope*, *Ib.*, 351; S. C., 26 L. J. Ch., 417, 425, as to effect of performance, before suit, of part of contract which the court could not enforce.

CHAPTER XII.

DEFECT IN SUBJECT OF CONTRACT.

- 400. Defect in subject matter a ground for relief.
- 401. Defect which is patent not a defence.
- 402. Deficiency or excess in quantity.
- 403. In case of encroachment.
- 404. Destruction of property.
- 405. Liability, or restriction.
- 406. Defect of which both parties are ignorant.
- 407. Where property is sold in gross.
- 408. Sale with all faults.

§ 400. *May be objected to bill.*—A substantial defect in, or a misdescription of the subject matter of, the contract, will constitute a good defence to a suit for specific performance. The plaintiff's title may not be disputed; and yet, if it relates to something different from that which the defendant contracted for, it is clear that the plaintiff has no just claim to the interposition of the court, there being a failure of the very purpose and inducement of the contract.¹ Cases of misrepresentation and mistake have already been considered;² and it is proposed in this place to treat of such defects as do not involve those questions.

§ 401. *Obvious defects.*—We have seen that a defect which the party objecting it ought himself to have ascertained, will not excuse performance.³ Where, for instance, at the time of entering into a contract of purchase, the vendee might by the exercise of diligence have known that there was a subsisting right of dower in the property, a court of equity will not relieve him, but he will be left to his legal

¹ Where a vendee of land upon receiving a bond for title gives a note therefor which shows on its face that it was so given, an assignee or holder of the note cannot, in case of a deficiency, recover on the note, though he took it previous to its falling due. *Howard v. Kimball*, 65 N. C., 175.

² *Ante*, Ch. X.

³ *Ante*, § 317.

remedy.¹ As already stated, in treating of misrepresentation,² the same distinction holds good in suits for specific performance, as in actions at law on a warranty, with reference to defects which are open and visible or patent, and such as are latent, the former not being a ground of defence. Therefore, where a man purchased a meadow with a road around it and a right of way across it, which were not referred to in the description, and he refused to complete the contract on account of this defect, specific performance was decreed with costs.³ A minute examination of the property for defects, is not required of the purchaser; and a defect will be deemed latent, unless it is an obvious and unmistakable object of sense. Where the purchaser of upper land objected to the existence of the right, granted with the lower land, to go on to the upper land, take water from a spring, and cut and cleanse gutters for the conveyance of water to wells on the lower land, it was held that he had no such knowledge, or notice, as precluded the defence, although it was proved that he had resided in the neighborhood for a long time, was familiar with the property, and, in passing, had constantly seen some of the wells on the lower land supplied from the upper land.⁴

§ 402. *Error in quantity of land sold.*—Where the contract is such as entitles a person to a conveyance of real estate, he will not be compelled to receive one that is defective.⁵ If the owner of land sells it on a description given by himself, he is bound in equity to make good that description, and he is liable for any variance in a material respect, although the variance be caused by a mistake.⁶ In

¹ Greenleaf v. Queen, 1 Pet., 138.

² *Ante*, § 317.

³ Oldfield v. Round, 5 Ves., 508. See Pope v. Garland, 4 Y. & C. Ex., 404; Ellard v. Lord Llandaff, 1 Ball & Beatty, 241.

⁴ Shackleton v. Sutcliffe, 1 De G. & Sm., 609. There is no doubt that the vendor, if he knows of even patent defects in the subject of the contract, is morally bound to inform the purchaser of them, though this doctrine has been denied with some show of plausibility. It is, however, what has been termed a duty of imperfect obligation.

⁵ Watts v. Waddle, 1 McLean, 200; Sohler v. Williams, 1 Curtis, 479; Brown v. Cannon, 10 Ill., 174; Richmond v. Gray, 3 Allen, 25; St. Mary's Church v. Stockton, 8 N. J. Eq., 525; Winne v. Reynolds, 6 Paige Ch., 407.

⁶ McFerran v. Taylor, 3 Cranch, 268.

equity, where the vendor can convey only an insignificant and immaterial part of what is bargained for, a vendee will not be compelled to take that, even at a corresponding reduction of the price. But if the vendor can substantially perform his contract, and the part as to which he cannot perform is of such a character as to admit of compensation being made to the vendee for the failure, the court will decree specific performance of the contract so modified.¹ A deficiency of one-third in the quantity of land would entitle the purchaser to rescind the contract, or to an abatement of the price.² Where there was a deficiency of three hundred and fifty-five acres in a tract described as containing sixteen hundred and seventy acres, more or less, it was held that the purchaser was entitled to an abatement.³ The same was held where the land was described as containing one thousand acres, more or less, when it contained in fact only six hundred acres.⁴ Land, sold at auction, was advertised as a freehold estate consisting of one hundred and eighty-six acres, forty-five acres of which were described as a farm, and the rest as a park. It afterward appeared that two acres in the centre of the park were not freehold property, but land held at will. In a suit for specific performance, Lord Thurlow remarked that where property was sold at auction, it was difficult to state all the little particulars relative to the quantity, title, and situation, so as not to call for

¹ *Winne v. Reynolds*, *supra*; *Shaw v. Vincent*, 64 N. C., 690; *Howard v. Kimball*, 65 Ib., 175; *post*, § 502. In *Drewe v. Corp*, 9 Ves., 368, Sir William Grant, M. R., said that there was no instance of compelling a man who had contracted for a freehold to take a leasehold estate; that where a party gets substantially that for which he contracts, any small difference may be remedied by compensation; but not where it extends to the whole estate. See *Hulmes v. Thorpe*, 1 Halst. Ch., 415. A court of equity will weigh the object and inducement of the purchaser, and look to the merits and substantial justice of each case. It is not every defect in the subject sold, or variation from the description, that will avail to discharge the purchaser from his contract. If he gets substantially what he bargained for, he must take a compensation for the deficiency. *Weems v. Brewer*, 2 Har. & Gill, 390.

² *Wilcoxon v. Calloway*, 67 N. C., 463.

³ *Gentry v. Hamilton*, 3 Ired. Eq., 376.

⁴ *Leigh v. Crump*, 1 Ired. Eq., 299. And see *Jacob v. Locke*, 2 Ib., 86.

some consideration when the bargain came to be executed ; and, in granting a decree, he referred it to a master to determine what deduction from the price ought to be allowed.¹ Where the difference between the property sold and the description of it is an excess of quantity, the vendor cannot enforce the contract against an unwilling vendee. For, "it is unnecessary for a man, who has contracted to purchase one thing, to explain why he refuses to accept another."²

§ 403. *Encroachment on land sold.*—The defect complained of may arise from an encroachment. Where a lot conveyed by warranty deed free of incumbrance was afterward found by the purchaser to be encroached upon by a building, it was held that he was entitled to recover back what (ten per cent.) he had paid.³ Real estate, consisting

¹ Calcraft v. Roebuck, 1 Ves. Jr., 221. "The American courts have shown more unwillingness than the English to encourage litigation about the amount of the price by reason of a variation in the quantity of land agreed to be conveyed, without clear evidence that the quantity was made an essential element of the bargain." Gray, J., in Noble v. Googins, 99 Mass., 231. See Mann v. Pearson, 2 Johns, 37. If the vendor's covenant be broken, the vendee has several remedies. He may rescind the contract; or, at his election, bring an action at law to recover damages, or institute a proceeding in equity to enforce specific performance. But if the vendor cannot convey the whole of the subject matter of the contract, equity will not compel the vendee to perform *pro tanto*. Thus, where tenants in common had contracted for the sale of their estate, and one of them died, it was held that the survivors could not force the purchaser to take their shares, but that he might compel the survivors to convey their shares, although the contract could not be enforced against the heirs of the deceased tenant in common. Atty. Genl. v. Day, 1 Ves. Sen., 218; S. P., Clarke v. Reins, 12 Gratt., 98.

² Ayles v. Cox, 16 Beav., 23. See Stanton v. Tattersall, 1 Sm. & G., 529. It is a rule, both at law and in equity, that a plaintiff may be permitted to recover a part only of what he claims. In Graham v. Gates, 6 Har. & Johns, 229, a bill was filed for specific performance of a contract for the purchase of land known as "Hempstead Hill." The evidence established the complainant's right to a part only of the land, and relief was decreed him to that extent. In Drury v. Conner, 6 Har. & Johns, 488, a conveyance of land known as "Oliver's Neck" was claimed. The proof entitled the complainant to an undivided fourth part only, and it was decreed him. So, in Bogan v. Daughdrill, 51 Ala., 312, which was a suit for the specific performance of a contract for the sale of four hundred acres of land, the complainant was found entitled to eighty acres only, and it was decreed accordingly. And see Mortlock v. Buller, 10 Ves., 315; Wood v. Griffith, 1 Swanst., 54; Milligan v. Cook, 16 Ves., 1; Graham v. Oliver, 3 Beav., 124; Nelthorpe v. Holgate, 1 Coll. C. C., 203; Waters v. Travis, 9 Johns, 464; Morse v. Elmendorf, 11 Paige Ch., 288; Napier v. Darlington, 70 Pa. St., 64; Schiffer v. Pruden, 64 N. Y., 47; White v. Dobson, 17 Gratt., 262.

³ King v. Knapp, 59 N. Y., 462.

of two lots, numbered 42 and 43, was sold at auction in one parcel, with the understanding on the part of the auctioneer and purchaser that lot 43 was vacant, whereas, in fact, buildings on lot 42 projected on lot 43 about twenty inches. The object of the vendee in making the purchase was to build a house on lot 43 twenty-two feet wide, leaving an alley three feet wide; but, in consequence of the encroachment, he would be compelled to make his house two feet narrower. It was held not such a material defect in the subject, or variation from the terms of the description at the sale, as would permit the purchaser to abandon his contract; but that as the vendor had stated that the buildings were on lot 42, the encroachment was not such a patent and obviously visible circumstance as to conclude the purchaser from compensation.¹

§ 404. *Accidental destruction of subject matter of contract.*—If the owner of a house and lot agrees to sell the property, and to execute and deliver a deed of the same upon the payment of a certain sum, and before the purchase money is all paid, the house is accidentally destroyed by fire, the vendor cannot recover or retain any part of the purchase money.² Such a case differs from that in which a lessee is held liable to pay rent, or make repairs according to his covenants, notwithstanding the destruction of the buildings by fire or other accident during the term. There, the lessor, by the execution and delivery of the lease, has performed the contract on his part; and the lessee, having become the owner of the leasehold interest, incurs the same risk of fire or other casualty as any other owner of property, and is not excused from the fulfilment of his express covenants. But neither party can rescind a written contract for the purchase of land in case of the

¹ King v. Bardeau, 6 Johns Ch., 38.

² Wells v. Calman, 107 Mass., 514; Thompson v. Gould, 20 Pick., 134; Bacon v. Simpson, 3 M. & W., 78. After an executory contract for the conveyance of real estate has been entered into by the execution of a bond for title and notes for the purchase money, the property is at the risk of the purchaser, and if it is destroyed by fire, it is his loss. Snyder v. Murdock, 51 Mo., 175.

accidental destruction of the buildings by fire, if they were not a principal inducement to the purchase.¹ Where the enjoyment of water, by the vendee, conveyed in pipes from a spring owned by the vendor, was a great inducement to the purchase, and the absence of water would very much lessen the value of the property, the destruction of the privilege after the sale and before conveyance, was held a good ground for avoiding the contract.²

§ 405. *Property sold subject to liability or restriction.*—The defect may consist of some liability of which the other party has no knowledge, or of some right restricting the purchaser's absolute enjoyment of the property, of which the vendor cannot procure a release, and which will therefore avoid the sale as against the purchaser.³ If the vendor's interest be determinable, the fact should be stated: as that an annuity is redeemable; ⁴ or that the property is liable to be taken for public use, under a statute.⁵ Where the vendor of leasehold property had, previous to the sale, received notice from his landlord of re-entry for neglect to make repairs, and did not apprise the purchaser of this notice, who, however, knew that the repairs had not been made, the contract was held void at the suit of the purchaser who had been evicted.⁶ But the vendor of a lease need not inform the purchaser that the covenants are uncommonly stringent; it being the duty of the latter to ascertain the character of the lease for himself.⁷

§ 406. *Defect unknown to both parties.*—A defect of which both the vendor and vendee have no knowledge at the time of the contract, will not be a defence to a suit for specific performance, unless the defect is such as ought to have been known to the vendor.⁸ A person, having in-

¹ Bautz v. Kuworth, 1 Montana, 133.

² Durett v. Simpson, 3 Monroe, 517.

³ Burnell v. Brown, 1 J. & W., 172; Gibson v. Spurrier, Peake's Ad. Ca., 50; Seaman v. Vawdrey, 16 Ves., 393; Forteblow v. Shirley, cited 2 Swanst., 223.

⁴ Coverley v. Burrell, Sug., 299.

⁵ Ballard v. Way, 1 M. & W., 520.

⁶ Stevens v. Adamson, 2 Stark, 422.

⁷ Hall v. Smith, 14 Ves., 426; Pope v. Garland, 4 Y. & C. Ex., 394; Patterson v. Long, 6 Beav., 590.

⁸ Lucas v. James, 8 Hare, 418. And see Parkinson v. Lee, 2 East., 314.

spected land in company with the agent of the owner, who stated that it contained between forty thousand and fifty thousand square feet, contracted to buy it at an agreed price per foot. The land being afterward found to contain sixty-six thousand square feet, the purchaser refused to take it on account of the excess; but it was held that he was not entitled to recover back the purchase money.¹ An uncertainty in the subject matter of a sale, the description being correspondingly uncertain, will of course afford no ground for relief; as where land sold is described in general terms as part freehold and part leasehold, and the precise boundary between the freehold and leasehold portions cannot be ascertained.²

• § 407. *Sale without statement of quantity.* — If real estate is sold in gross, and not as a designated quantity, a party cannot be relieved either for an excess or deficiency afterward discovered.³ Where a lot of land, sold at auction, was described as being in a certain inclosure, and as containing “nearly two acres,” specific performance was decreed against the purchaser, although the lot in fact contained only one acre and twelve rods.⁴ Of course, if a farm be purchased by its usual designation, without mention of the quantity, or reference to a plat, or any stipulation on the part of the vendor, and there is a less number of acres than the vendee supposed, there is no ground for any deduction for deficiency in quantity; though it would be otherwise if the purchaser should be deceived by the representations of the vendor.⁵ A description of land by boundaries, or the words more or less, or an equivalent expression, will control a statement as to the quantity of land, or the length of a boundary, so that neither party will be

¹ Dickinson v. Lee, 106 Mass., 557.

² Monro v. Taylor, 3 M’N. & G., 713. See Crosse v. Lawrence, 9 Hare, 462; Crosse v. Keene, *ib.*, 469.

³ Gillilan v. Hinkle, 8 W. Va., 262. It is otherwise, where the sale is by the acre. Wilson v. Randall, 67 N. Y., 338.

⁴ Foley v. M’Keown, 4 Leigh, 678.

⁵ Kent v. Carcaud, 17 Md., 291.

relieved by reason of a deficiency or surplus, unless the variation is so great as to give rise to the presumption of fraud or gross mistake.¹

§ 408. *Sale subject to any defect.*—Although when property is purchased with all faults, the contract is binding upon the purchaser even when there are latent defects not discoverable by him ;² yet such a contract will not protect the vendor when he adopts measures to conceal a defect, or to withdraw the purchaser's attention from it. As, moving a vessel off her ways, where she lies dry, into the water, to conceal her worm-eaten bottom and broken keel ;³ or purposely plastering and papering over a defect in the main wall of a house about to be sold.⁴ Where, however, the owner, being aware of a nuisance which rendered his house unfit to live in, did not tell his agent of its existence, and the latter, upon being asked by the proposed lessee whether there was any objection to the house, replied in the negative, it was held no defence to an action at law for a breach of the contract on the part of the lessee.⁵ But in equity, the decision would unquestionably have been the other way, for "a vendor cannot, although the estate be sold subject to all faults, rely on the aid of a court of equity, if he (designedly) omit to disclose a latent defect which the purchaser has no means of ascertaining."⁶

¹ Stebbins v. Eddy, 4 Mason, 414; Stull v. Hurrt, 9 Gill, 446; Ketchum v. Stout, 20 Ohio, 453; Marvin v. Bennett, 8 Paige Ch., 312; Morris Canal Co. v. Emmett, 9 Ib., 168; Faure v. Martin, 3 Seld., 210; Noble v. Googins, 99 Mass., 231. See Winch v. Winchester, 1 Ves. & B., 375; Townshend v. Stangroom, 6 Ves., 341; Hill v. Buckley, 17 Ib., 394. See *ante*, § 370. Where land sold was described as containing one hundred acres more or less, it was held that the purchaser was not entitled to an abatement, although there was a deficiency of thirty-six acres. Hudson v. Hudson, 64 Ga., 513.

² Baglehole v. Walters, 3 Camp, 154; Pickering v. Dowson, 4 Taunt., 779, overruling Mellish v. Motteux, Peake, 115.

³ Schneider v. Heath, 3 Camp, 506.

⁴ Ibid. See Shirley v. Stratton, 1 Bro. C. C., 440, *n*; Small v. Attwood, You., 490. The above-mentioned examples savor of fraud. See Early v. Garrett, 9 B. & C., 928; Springwell v. Allen, 2 East., 448, *n*.

⁵ Cornfoote v. Fowke, 6 M. & W., 358. And see Wilson v. Fuller, 3 Ad. & E. N. S., 68; 3 Gale & D., 570.

⁶ Dart's V. & P., 40, 41.

CHAPTER XIII.

ABSENCE, OR INSUFFICIENCY OF TITLE.

- 409. Vendor bound to give a good title.
- 410. Proof required of vendor as to title.
- 411. Purchaser not compelled to take a doubtful title.
- 412. What deemed a doubtful title.
- 413. Where the title has been questioned, or decided against.
- 414. Implied understanding as to title.
- 415. Unimportant defects disregarded.
- 416. In case of presumptive evidence of title.
- 417. Where there is suspicion of fraud.
- 418. Where the purchaser is in possession under a conveyance.
- 419. Right of vendee to time for investigation of title.
- 420. Delay of vendor in making title.
- 421. Where the vendee knows at the time of the contract that the title is defective.
- 422. Defect of title as to part of subject matter of contract.
- 423. When contract enforced with indemnity.
- 424. Waiver of defects.

§ 409. *Right of vendee to a good title.*—A title to real estate, being the means by which the owner of land has the just possession of his property,¹ it follows that when a person undertakes to sell property to which he has not in fact a good title, as it is out of his power to perform what the purchaser bargained for, the latter is released from obligation to fulfil on his part. Specific performance will not be decreed in favor of a vendor who, at the time of the contract, was not the owner of the property, or had not the power to become the owner by legal or equitable proceedings;² or

¹ 2 Blk. Com., 195.

² Lay v. Huber, 3 Watts, 367; Pipkin v. James, 1 Humph., 325; Hurley v. Brown, 98 Mass., 545; Morgan v. Morgan, 2 Wheat., 290; Garnett v. Macon, 2 Brock, 185; Tomlin v. McChord, 5 J. J. Marsh, 135; Owings v. Baldwin, 8 Gill, 337; Fitzpatrick v. Featherstone, 3 Ala., 40; Stevenson v. Buxton, 15 Abb. Pr., 352; Nicol v. Carr, 35 Pa. St., 381. Although the land was sold under a decree of the court, yet if there is a defect in the title of which the purchaser was not informed, he will not be compelled to take the property unless a good title can be given. Coster v. Clarke, 3 Edw. Ch., 428. In general, a purchaser of land will not be compelled to pay any portion of the purchase money, before a title is made out. Birdsall v. Waldron, 2 Edw. Ch., 315; or until proper assurances

where the vendor, since the contract, has conveyed the land to a third person for a valuable consideration without notice;¹ or mortgaged the property.² If the vendor has not the title, or the means of obtaining it, neither party can, of course, enforce the contract. A person who has contracted to take shares in a company, to be allotted to him, cannot have specific performance, if all of the shares have been previously allotted to others.³ So, if a contract is dependent upon the valuation or approval of a certain person who dies before acting, as the contract has become impossible, a suit for specific performance will be dismissed.⁴ But if,

as to the title are given by the vendor. *Shreck v. Pierce*, 3 Iowa, 350. A suit having been brought by a vendor against a purchaser for specific performance, and an inquiry directed as to the title, which resulted in a certificate that a good title had not been deduced, the plaintiff was ordered to repay to the defendant the deposit money, together with interest and costs of suit. *Turner v. Marriott*, L. R. 3, Eq. 744. When the vendor falsely and fraudulently represents that he has an absolute title, which representation is relied on by the purchaser, the collection of the purchase money will be enjoined until the title shall have been made good. *Hinkle v. Margerum*, 50 Ind., 240. See *Davis v. Perkins*, 40 Iowa, 82. The meaning of specific performance is, that there shall be conveyed what the vendor has contracted to sell to the purchaser. But although the vendor may have entered into a contract that he shall not be bound to produce a title, yet the terms of the contract may be such, that if it appears that he has no title, specific performance will not be decreed. If no provision be made in the contract for a covenant to be inserted in the deed, equity will not for that reason enforce specific performance, unless the vendee expressly assumes the risk as to title. *Bates v. Delavan*, 5 Paige Ch., 299; *Chambers v. Tulane*, 9 N. J. Eq., 146. Where, however, on a bill for specific performance of an agreement to purchase certain lands, "the seller only to produce a title from his vendor," it appeared that the plaintiff, at the instance of the defendant, had purchased all the estate, right, title, and interest, in the said lands, from one of four reputed owners, it was held that the defendant could not show, *aliunde*, that the plaintiff's vendor had no title, and specific performance was decreed. *Hume v. Pocock*, L. R. 1, Eq. 423; *Affid.*, L. R. 1, Ch. 379.

¹ *Shields v. Trammill*, 19 Ark., 51; *Ferrier v. Buzick*, 2 Iowa, 126; *Brueggeman v. Jurgensen*, 24 Mo., 87. A purchaser from a person holding the legal title, for valuable consideration, without notice of outstanding equities, takes it divested of such equities. *Farmer's Nat. Bk. v. Fletcher*, 44 Iowa, 252. Where the owner of property having contracted to sell it to one person, afterward sold and conveyed it for a valuable consideration to another person who had no notice of the former contract, it was held that the original purchaser was not entitled to specific performance; it being out of the power of the vendor to fulfil the contract. *Denton v. Stewart*, 1 Cox, 258; *Greenaway v. Adams*, 12 Ves., 395. If the second purchaser had notice of the first sale, he would be bound to make it good. *Potter v. Sanders*, 6 Hare, 1. Where a husband acts as his wife's agent in purchasing property for her, his notice and knowledge that the property was previously sold to another person, will be regarded as notice to and knowledge of the wife. *Hensler v. Sefrin*, 19 Hun., 564.

² *Huber v. Burke*, 11 Serg. & Rawle, 238. ³ *Ferguson v. Wilson*, L. R. 2, Ch. 77.

⁴ *Frith v. Midland R.R.*, L. R. 20, Eq. 238.

although the vendor has not a clear title, he has the means of obtaining it, and is ready and willing to do so, and the purchaser refuses to complete, he cannot recover back what he has already paid.¹ Where land has been sold for taxes, the owner has the means to perfect the title, and the vendee may be compelled to take it.² Before, however, the vendor can obtain a decree for specific performance, he must make a case showing a moral certainty that the purchaser will receive such a title as he has contracted for.³ Two parcels of land were embraced in an entire contract of sale, one of which was, in fact, owned by the vendor's wife, who was not a party to the contract, nor referred to in it; but the land was described as the property of the husband. The vendee was put into possession; but, before a conveyance was executed, the husband died. A suit for specific performance having been brought by the widow and children, it was held that the contract could not be enforced by them; and the purchaser consenting to have the contract rescinded, an order was entered to that effect.⁴

§ 410. *Duty of vendor to give a title.*—The evidences of his title being matters peculiarly within the knowledge of the vendor, when he contracts to convey a clear title, he must aver and prove, in a suit brought by him against the vendee for specific performance, that he is able and willing to give such a title as would be satisfactory to persons of ordinary prudence. If there be a judgment lien on the property, the purchaser will not be compelled to complete, unless he can be protected by an application of the purchase money to the discharge of the judgment, even though the

¹ Marsh v. Wyckoff, 10 Bosw., 202.

² Leg v. Huber, 3 Watts, 367.

³ Hinckley v. Smith, 51 N. Y., 21.

⁴ Hoover v. Calhoun, 16 Gratt., 109. In this case it was admitted that the wife was not bound by the agreement, and that, in general, specific performance would not be decreed, unless the contract was mutually obligatory. But it was claimed that she might adopt the contract of her husband, and that by filing a bill for specific performance, she made the remedy mutual. But it will be borne in mind, that, as a rule, a contract can only be enforced between the parties themselves, or those claiming under them, in privity of estate, or of representation, or of title. Moreover, equity will not compel the purchaser of an entire tract of land, to take a part of it.

judgment debtor has other property which might be taken to satisfy the judgment.¹ A. entered into a contract with B. to sell him certain real estate free of incumbrance, five hundred dollars to be paid upon the delivery of the deed, and a bond and mortgage to be given for the balance of the purchase money. There were mortgages on the property, but A. had a verbal understanding with the mortgagees, that they would take the mortgage to be given by B. and release their mortgages. B. declining to take the property, A. tendered a deed and brought a suit for specific performance. It was held that as the mortgages on the property had not been actually released, B. could not be compelled to perform.² When the vendor agrees to convey land free of incumbrances, his inability to procure the release of an outstanding inchoate right of dower is a breach of his contract.³ Where real estate held in trust was to be conveyed to the *cestuis que trust* upon a certain event which had happened, and the latter, having entered into a contract for the sale of the property, filed a bill against the purchaser for specific performance, it was held that the purchaser ought not to be obliged to accept the title until it was perfected by a conveyance from the trustee at the expense of the vendors.⁴

¹ Walsh v. Barton, 24 Ohio St., 28.

² Hinckley v. Smith, *supra*. Where real estate is offered for sale at auction as free from incumbrance, and a purchaser, having paid full value for the property, afterward discovers that there are mortgages on it, he cannot be compelled to accept the title. Mayer v. Adrian, 77 N. C., 83.

³ Shearer v. Ranger, 22 Pick., 447; Prescott v. Truman, 4 Mass., 629; Henderson v. Henderson, 13 Mo., 152; Smith v. Cannel, 32 Me., 126; Holmes v. Holmes, 12 Barb., 137; Heimburg v. Ismay, 35 N. Y. Sup. Ct., 35. *Contra*, Obernyce v. Obertz, 17 Ohio, 71; Blair v. Rankin, 11 Miss., 440. And see Manson v. Brimfield Manf. Co., 3 Mason, 355. But if the vendor, instead of stipulating that the property is free from incumbrance, covenants that the purchaser shall enjoy free from incumbrances, the covenant is not broken by the existence of a mere right of dower. Vane v. Lord Barnard, Gilbert, Eq. R., 7. "It is one of the best settled principles of the law of vendor and purchaser, that, as a general rule, the right of the latter to a title clear of all claims whatsoever, present and future, fixed or contingent, is one of which he cannot be deprived but by his own acts. It is a right, as has been often observed by the greatest equity judges, given by the law, and not springing from the contract of the parties." Rawle on Covenants, 138, 139.

⁴ Read v. Power, 12 R. I., 16.

§ 411. *Vendee not obliged to accept a doubtful title.*—Specific performance will not be decreed against the purchaser when the title is doubtful.¹ It is a sufficient objection if the facts throw a cloud on the title, and render it suspicious in the minds of reasonable men.² In one case, the title of the vendor being derived by purchase from his son, in consideration of an annuity and the release of a debt, it was held that the vendor was bound to prove that the transaction was *bona fide*.³ Where executors sold real estate, the testator's title to five-sixths being clear, but for the other sixth no deed could be found, and evidence was introduced to prove that the former owner made a deed of it, though there was a doubt whether the witness might not be mistaken as to the property conveyed, specific performance was refused; and the deed for the one-sixth having afterward been found, but the property having in the meantime greatly depreciated in value, it was held that the purchaser would not be compelled to take it.⁴ Where the uncertainty as to the title arose chiefly from vague and obscure testimony, and the uncertainty might perhaps be removed by further testimony, the chancellor directed that the examination should be pursued, and the questions of fact be submitted to a jury.⁵ The equitable, as well as the legal, title, must be satisfactory to the court, or specific

¹ Vancouver v. Bliss, 11 Ves., 458; Shapland v. Smith, 1 Bro. C. C., 75; Sloper v. Fish, 2 Ves. & Bea., 145; Collier v. M'Bean, L. R. 1, Ch. 81; Howarth v. Smith, 6 Sim., 161; Mullins v. Trinder, L. R. 10, Eq. 449; Sohier v. Williams, 1 Curtis C. C., 479; Dutch Church v. Mott, 7 Paige Ch., 77; Seymour v. Delancey, Hopkins Ch., 436; 5 Cowen, 714; Bartlett v. Blanton, 4 J. J. Marsh, 426; Jarman v. Davis, 4 T. B. Mon., 115; Hightower v. Smith, 5 J. J. Marsh, 542; Beckwith v. Kouns, 6 B. Mon., 222; Starnes v. Allison, 2 Head, Tenn., 221; Sturtevant v. Jaques, 14 Allen, 523; Swayne v. Lyon, 67 Pa. St., 436; Young v. Rathbone, 1 C. E. Green, 224; Griffin v. Cunningham, 19 Gratt., 571; Powell v. Conant, 33 Mich., 396.

² Snyder v. Spaulding, 57 Ill., 480; Lowry v. Muldron, 8 Rich. Eq., 241; Butler v. O'Hear, 1 Dessaus Eq., 382; Collins v. Smith, 1 Head, Tenn., 251; Littlefield v. Tinsley, 26 Texas, 353. For a case showing what defects will induce a court of equity to refuse aid to the vendor when there is doubt in relation to the title, see Dalzell v. Crawford, 1 Pars. Sel. Cas., 37.

³ Boswell v. Mendham, 6 Mad., 373.

⁴ Griffin v. Cunningham, *supra*. See Golden v. Knapp, 28 N. J. Eq., 605.

⁵ Seymour v. Delancey, *supra*.

performance will not be decreed against the vendee.¹ Notwithstanding, therefore, a court of law certifies in favor of the title, if there be an equitable objection to it, specific performance will be refused.² If the doubt depend on a point of law, it may be decided by the court.³ The purchaser may be compelled to accept the title, notwithstanding it was held bad in the court below, if the appellate court decide otherwise.⁴ It was formerly the practice of the court to decide, in all cases of disputed title, either for or against the validity of the title, and either to compel the purchaser to take it as good or to dismiss the bill on the ground that it was bad. But now the court, without deciding that a title is bad, may regard it as so doubtful, that it will not compel a purchaser to take it.⁵ It has been said that every title is good or bad, and that the court ought to know nothing of a doubtful title.⁶ But "though every

¹ Creigh v. Shatto, 9 Watts & Serg., 82.

² Morrison v. Barrow, 1 De G. F. & J., 633. A defective equitable title will be deemed a sufficient objection in a court of law. In Cadwallader v. Price, 11 Jur., 132, Baron Parke said: "This is not the only case in which courts of law are called on to determine questions appertaining to courts of equity. Where a man sells an estate, we are called on to say whether the title he offers is a good one both at law and in equity, and the point before us in such cases is, can such good title be made?"

³ Lyddal v. Weston, 2 Atk., 20; Minet v. Leman, 1 Jur. N. S., 411; Beioley v. Carter, L. R. 4, Ch. 230.

⁴ Mullins v. Trinder, 18 W. R., 1186; Beioley v. Carter, *supra*. But see *post*, § 413.

⁵ Marlow v. Smith, 2 P. Wms., 198; Sloper v. Fish, 2 V. & B., 149. And see Cooper v. Denne, 4 Bro. C. C., 80; S. C., 1 Ves. Jr., 565; Sheffield v. Lord Mulgrave, 2 Ib., 526; Roake v. Kidd, 5 Ves., 647; Wilcox v. Bellaers, T. & R., 491. A decision of the court as to the validity of a title removes the doubt respecting it, and specific performance will be decreed. Bell v. Holtby, L. R. 15, Eq. 178. "Where doubtful cases of construction arise, whether on an act of Parliament or the words of an instrument or will, it is the duty of this court to remove that doubt by deciding it; and, instead of feeling a doubt whether other judges at other times may think in the same way with them, I consider it the duty of the court to assume that that which a competent tribunal has at one time decided will be followed at future times, and that that which judges at the present time think right, it is to be assumed judges of equal competency in the future will think right also." *Ibid.*, per Malins, V. C.

⁶ See Vancouver v. Bliss, 11 Ves., 465. In this case, Lord Eldon remarked that he "recollected the period when it was the office of the court to decide whether the title was good or not, and it was thought better that the dry rule should prevail that if the title was good the purchaser should take it, than that the court should speculate upon the point whether there was more or less difficulty in the title, and say in one case he should take it, in another he should not.

title must, in itself, be either good or bad, there must be many titles which the court cannot pronounce with certainty to belong to either of these categories in the absence of the parties interested in supporting both alternatives, and without having heard the evidence they might have to produce and the arguments they might be able to urge; and it is in the absence of these parties that the question is generally agitated in suits for specific performance. The court, when fully informed, must know whether the title be good or bad. When partially informed, it often may and ought to doubt."¹

§ 412. *What doubt as to title will be a defence.*—Although no general rule can be laid down as to the kind of doubt which will induce the court to withhold a decree for specific performance, yet it will do so, if a third person has an interest in, or claim against, the property, however improbable it be that the right will be exercised; for the decree of the court is *in personam*, and not *in rem*, and binds only those who are parties to the suit, and persons

The old course was, that if the parties were afraid of the decision, they appealed; and had, not a title absolutely indefeasible, but as good a warranty as could be procured. The departure from that course has been attended with great mischief. Whenever a contract is made for the purchase of land, though no doubt has ever been entertained upon the title, no one thinking of disputing it, if the purchaser has a good bargain, he overlooks all these objections; but if he finds he cannot sell the estate as well as he wished, or cannot enjoy it to his satisfaction, the first thing is that the abstract goes to some one for the express purpose of finding out objections, and opinions are given on both sides. I feel great concern for the owners of this sort of property. The consequence is, not only the misery arising from the uncertainty whether that which they have been enjoying with happiness, and upon which their families are to subsist, is their property; but it is an invitation to all who may fancy they have an interest in it, to make an attack. There cannot be much doubt, therefore, which is the best rule." See *Jervoise v. Duke of Northumberland*, 1 J. & W., 568.

¹ Fry on Specif. Perform., 254, 255. "This anomaly in the practice of courts of equity, which refuse to decide whether the title is good or bad, and only decide that there is doubt about it, and which refuse to force the purchaser to take the title if there is a cloud upon it, incidentally arose from their considering that there was a remedy at law, and that the jurisdiction was therefore discretionary. But the doctrine seems now to be too well established to allow us to confine its application to those cases where relief can be obtained at law. It is said that the court, knowing that its decision on the title could not bind everybody, would not force the purchaser to take a title which it could not warrant to him. But this obviously supposed an uncertainty as to the law, which ought in a perfect system of jurisprudence never to be presumed." Batten on Specif. Perform., 117.

claiming under them.¹ "Every purchaser of land has a right to demand a title which shall protect him from anxiety, lest annoying, if not successful, suits, be brought against him, and probably take from him, or his representatives, land upon which money was invested. He should have a title which should enable him, not only to hold his land, but to hold it in peace; and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value."² When doubts are raised by extrinsic circumstances, which neither the purchaser nor the court can satisfactorily investigate, for the want of means to do so, the court will refuse its aid. But a threat, or even the possibility of a contest, will not suffice to cast a reasonable doubt on the title.³ The doubt must be "considerable and rational, such as would and ought to induce a prudent man to pause and hesitate; not based on captious, frivolous, and

¹ *Pyrke v. Waddingham*, 10 Hare, 1; *Richmond v. Gray*, 3 Allen, 25; *Voorhees v. De Myer*, 3 Sandf. Ch., 614; *Sturtevant v. Jaques*, 14 Allen, 525; *Swayne v. Lyon*, 67 Pa. St., 436; *Griffin v. Cunningham*, 19 Gratt., 571; *Dobbs v. Norcross*, 24 N. J. Eq., 327; *Smith v. Turner*, 50 Ind., 367; *Jeffries v. Jeffries*, 117 Mass., 184.

² *Dobbs v. Norcross*, *supra*. In a sale made by order of court one of the conditions provided that the abstract should commence with a certain conveyance, that the purchaser should accept such commencement as a good root of title, and not make any objection in respect of any prior title; and by another condition, the purchaser was to accept all recitals and statements, in every abstracted document dated twenty years or more prior to the sale, as sufficient. The purchaser having investigated the prior title, and ascertained that it was bad, it was held that he had a right to be discharged from his purchase. The court said: "A buyer no doubt knows that unusual conditions of sale are framed to meet peculiar difficulties; and these are quite fair even when framed by the court, if they will still, in the opinion of the court, leave the purchaser in the complete possession of the thing he has bought, even though he does not get what is called a marketable title; but if not, the court has no right to enter into such contests, and try to fence with and outwit purchasers, and sell on the chance of the purchaser being able to resist a suit for the recovery of the possession of the lands on a defect not disclosed to him. I am of opinion that such a condition would be bad as a fraudulent misleading condition in any sale, for it professes, or induces the buyer to believe, that the recital accurately represents the will, which it does not. But in a sale under the authority of the court of chancery, which above all things ought to teach others and set them an example of straightforward dealing, and telling the truth, and the whole truth, such a condition, under the circumstances of this case, is in my opinion binding on no one. No good title being shown, and the purchaser not being bound by the conditions of sale to accept a bad one, he must be discharged from his purchase, and have his costs of the whole proceedings." *Romilly, M. R., Else v. Else*, L. R. 13, Eq. 196.

³ *Kostenbader v. Spotts*, 80 Pa. St., 430.

astute niceties, but such as produce real *bona fide* hesitation in the mind of the chancellor.”¹ Where the title of the vendor depended upon the construction of a will, the court declined to enforce specific performance, although it was of the opinion that the title was good.² The purchaser will not be compelled to accept a title depending upon an illegal and invalid sale while it remains open to review by a court of law, although the judgment unreversed might be conclusive on the party’s rights.³ If a suit be pending against the vendor in which an adverse claim is set up to part of the land, the purchaser will not be compelled to complete until after a decision has been rendered.⁴ A vendee will not be compelled to accept a title depending upon an act of the Legislature of doubtful validity.⁵ Where the evidence of title was merely that of long possession, it was held that the purchaser would not be compelled to accept the title.⁶ Spe-

¹ Lord Eldon in *Stapylton v. Scott*, 16 Ves., 272. Two messuages, held under separate trusts, belonging to a testator’s estate, were put up for sale together under a decree for administering the estate, and it was provided that the purchase money should be paid into court. The purchaser objected to the title on the ground that the two properties were sold together, without any provision for apportioning the amount realized. It was held, affirming the decision of the vice-chancellor, that this objection could not be sustained, for the court having the money in its custody, would see it properly applied. But, for the satisfaction of the purchaser, the purchase money was ordered to be apportioned, and paid into court to separate accounts. *Cavendish v. Cavendish*, L. R. 10, Ch. 319. A trustee had a discretionary trust for the sale of real estate under a will, at such price as he should think reasonable, with power to postpone the sale, and lease the property for thirty years with the concurrence of the beneficiaries. Having done the latter, before the termination of the lease the property was put up for sale by the lessee and trustee conjointly, the facts being disclosed by the particulars of sale; and a sale having been made, the purchase money was apportioned between the two interests according to the valuation of a competent valuer. It was held that the purchaser could insist on the concurrence of the beneficiaries on the ground that the valuation was not made before the sale, but that he must take the title. *Morris v. Debenham*, L. R. 2, Ch. D. 540.

² *Pyrke v. Waddingham*, *supra*.

³ *Young v. Rathbone*, 16 N. J. Eq., 224.

⁴ *McCulloch v. Gregory*, 2 Jur. N. S., 1134; *Grove v. Bastard*, 2 Phil., 619; *Bentley v. Craven*, 17 Beav., 204. Equity will not compel one who has purchased land through an agent under an agreement that he is to have a perfect title, to accept a deed, where notice of *lis pendens* is filed impeaching the vendor’s title. *Earl v. Campbell*, 14 How. Pr., 330.

⁵ *Bumberger v. Clippinger*, 5 Watts & Serg., 311.

⁶ *Cunningham v. Sharp*, 11 Humph., 116. Twenty years’ uninterrupted possession is not sufficient to raise the presumption of a conveyance from the vendor’s immediate grantor. *Lewis v. Herndon*, 3 Litt., 358. A conveyance will not be decreed, where naked possession is the only evidence of title. Rights growing out of possession, are matters of legal cognizance. *Smith v. Hollenback*, 57 Ill., 223. But see *Strober v. Dutton*, 6 Phila., 185.

cific performance will not be decreed, unless the vendor can give a marketable title, even though a court might consider the title good.¹ But there must be some debatable ground on which the doubt can be justified.² A title may be doubtful because it depends on a doubtful question of law not settled by any binding authority, of which different courts may take an opposite view, and where those who may hereafter claim an interest in the property, will not be concluded by the decree.³ A doubtful title cannot be made marketable by an opinion of the court on a case stated between the vendor and vendee.⁴ A title depending upon the bar of the statute of limitations, may be a marketable title which a purchaser will be compelled to accept, if it clearly appear that the entry of the real owner is barred.⁵ Where a contract for the purchase of property is "subject to the approval of the title by the purchaser's solicitor," if the latter disapproves of the title, the vendor, in the absence of bad faith or unreasonableness on the part of the purchaser or his solicitor, cannot enforce specific performance of the contract.⁶ A condition in a contract of sale, that "if the purchaser shall make any objection or requisition in respect

¹ *Swayne v. Lyon*, 67 Pa. St., 436; *Freetly v. Barnhart*, 51 Ib., 279; *Speakman v. Forepaugh*, 44 Ib., 363; *Butler v. O'Hear*, 1 *Dessaus Eq.*, 382; *Linkous v. Cooper*, 2 W. Va., 67; *Thompson v. Dulles*, 5 *Rich. Eq.*, 370; *Littlefield v. Tinsley*, 26 Texas, 353; *Powell v. Conant*, 33 Mich., 396.

² *Vreeland v. Blauvelt*, 23 N. J. Eq., 483.

³ *Sohier v. Williams*, 1 *Curtis C. C.*, 479; *McDonald v. Walker*, 11 *Eng. L. & Eq.*, 324; *Wilson v. Bennett*, 13 Ib., 431. A doubtful title which the purchaser will not be compelled to accept, may be in relation to either a matter of law, or of fact. The doubt may arise from the general law of the land, or from the construction of particular instruments. *Sloper v. Fish*, 2 V. & B., 145; *Blosse v. Lord Clammorris*, 3 Bli., 62; *Lincoln v. Arcedeckne*, 1 *Coll. C. C.*, 38; *Bristow v. Wood*, Ib., 480; *Pyrke v. Waddingham*, 10 *Hare*, 9; or it may be with respect to facts connected with the title, or in relation to extrinsic facts. It may relate to a fact susceptible of proof, but which has not been satisfactorily established. *Smith v. Death*, 5 *Mad.*, 371; or to a matter incapable of satisfactory proof.

⁴ *Pratt v. Eby*, 67 Pa. St., 396.

⁵ *Shober v. Dutton*, 6 *Phila.*, 185. The purchaser will not be compelled to accept and pay for land which the seller claims to own only by having had possession of it himself for the time prescribed by the statute of limitations as a bar to a suit to recover it against him, unless the purchaser took possession under the contract, and continues to hold it. *Chapman v. Lee*, 55 *Ala.*, 616.

⁶ *Hudson v. Buck*, L. R. 7, Ch. D. 683.

of the title, or of any other matter or thing whatsoever which the vendor shall be unwilling on the ground of expense or otherwise to comply with," the vendor shall be at liberty to annul the sale, does not give the vendor a right to rescind the contract where he fails to show any title whatever; but, in that case, the purchaser may have judgment for such damages, costs, and expenses, as he may have sustained in consequence of the non-performance of the contract.¹

§ 413. *Where title has been objected to, or pronounced bad.*—Notwithstanding the court may regard the title favorably, if it has been questioned by other persons whose opinion on the subject is entitled to respect, specific performance may be refused.² But how far such a circumstance will ever weigh with the court, must of course depend upon the nature of the objection and of the case. It would be likely, in any event, to cause the judge to examine the question with the greatest care, and to decide in favor of the title only upon the most settled convictions.³ It has been held in England, that if the title has been decided against by the lower court, the appellate court, though of a different opinion, will not compel the purchaser to accept the title;⁴ or the latter court may, under such circumstances, decline to pass upon the title, and refuse to aid in enforcing the contract,⁵ unless the case involves a question of general law concerning real estate applicable to all similar cases, which the court is bound to determine.⁶

¹ Bowman v. Hyland, L. R. 8, Ch. D. 588.

² Price v. Strange, 6 Mad., 159, 164; Pyrke v. Waddingham, 10 Hare, 1; Snyder v. Spaulding, 57 Ill., 480.

³ See Wrigley v. Sykes, 21 Beav., 337; Hamilton v. Buckmaster, L. R. 3, Eq. 323.

⁴ Rose v. Calland, 5 Ves., 186. But see *ante*, § 411.

⁵ Collier v. McBean, L. R. 1, Ch. 81.

⁶ Alexander v. Mills, L. R. 6, Ch. 124, 131. In this case the court remarked as follows: "We do not say that there may not be cases in which a question of law may be considered doubtful, that a court would not, on its own view, compel a purchaser to take a title. Still, as a general, almost universal, rule, the court is bound as much between the vendor and purchaser, as in any other case, to ascertain and determine, as it best may, what the law is, and to take that to be

§ 414. *What implied with reference to title.*—In every contract for the sale of land, there is an implied undertaking to make a good title, unless such an obligation is excluded by the terms of the agreement; and the purchaser is not bound to accept a quit-claim deed where the vendor's chain of title on the record is defective in consequence of the alleged loss of one of the conveyances.¹ As a general rule, it makes but little difference what the precise terms of the contract are—whether the vendor agrees to make title, or a good title, or to make a deed, or a warranty deed—if it appears that he is negotiating to sell at a sound price, to be paid, or part paid, at the conveyance. In such cases, usually, the vendor, without a nice examination of words, is understood to agree to furnish a good title, and the vendee cannot be put off with merely a good deed. This rule, however, does not preclude those cases where the vendee appears to be purchasing the vendor's title such as it may be.² Where A., B., and C. gave their bond to D. conditioned to make a lawful title to him of certain land, and A. tendered D. a general warranty deed for the land, B. tendered a general warranty deed for an undivided third part of the

law which it has so ascertained and determined. The exceptions to this will probably be found to consist, not in pure questions of legal principle, but in cases where the difficulty and doubt arise in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument. This case involves a question of general law, applicable to all similar settlements, and we are bound to say, one way or the other, what that law is; and we cannot in such a case escape from that duty by saying that the decision of the master of the rolls, in taking one view, makes the other view, if held by us, so doubtful that we cannot force it on the purchaser." See *Beioley v. Carter*, L. R. 4 Ch., 230; *Bell v. Holtby*, L. R. 15 Eq., 178.

¹ *Matter of Hunter*, 1 Edw. Ch., 1; *Holland v. Holmes*, 14 Fla., 390. Upon a sale of real estate without any stipulation as to the nature of the title, the purchaser has a right to a clear title and a deed with covenants of general warranty. *Goddin v. Vaughn*, 14 Gratt., 102; *Witter v. Biscoe*, 13 Ark., 422; *Tremain v. Lining*, Wright, 644; *Clark v. Lyons*, 25 Ill., 105; *Vardeman v. Lawson*, 17 Texas, 10. And see *Holman v. Criswell*, 13 Ark., 422. Unless a purchaser at a judicial sale is put upon his guard by a previous notice, he may insist on a good title; and he will not be compelled to pay the purchase money and accept a conveyance, unless defects shown by him are remedied. *Fryer v. Rockefeller*, 63 N. Y., 268. See, however, *Corbitt v. Dawkins*, 54 Ala., 282, where it was held that in judicial sales, in the absence of fraud, no inquiry into the title can be indulged, but the purchaser will be conclusively presumed to have inquired for himself, and to have ascertained what he was purchasing.

² *Shreck v. Pierce*, 3 Iowa, 350.

land, and C. made a similar deed for another third, it was held insufficient; D. being entitled to a joint deed, with the usual covenants, executed by all three of the obligors.¹ When a purchaser has contracted for a good title of record, and, upon a bill filed by the vendor for specific performance, it appears that the plaintiff has only a title dependent upon adverse possession, the vendee will not be compelled to take that; a good title of record being different, and more desirable, than one depending upon a variety of extrinsic circumstances to be established by parol evidence.² An agreement to give a "good deed," is not simply a promise to execute a deed in legal form with proper warranty, but a deed good and sufficient both in form and substance to convey a valid title to the land.³ If an inquiry be directed in general terms

¹ Clark v. Redman, 1 Blackf., 379.

² Page v. Greeley, 75 Ill., 400.

³ Clute v. Robinson, 2 Johns, 413; Jones v. Gardiner, 10 Ib., 266; Judson v. Wass, 11 Ib., 528; Carpenter v. Bailey, 17 Ind., 244; Traver v. Halstead, 23 Ib., 66; Everson v. Kirtland, 4 Paige Ch., 638; Pomeroy v. Drury, 14 Barb., 424; Fletcher v. Button, 4 N. Y., 400; Burwell v. Jackson, 9 Ib., 535; Story v. Conger, 36 Ib., 673; Swan v. Drury, 22 Pick., 488; Mead v. Fox, 6 Cush., 202; Gilchrist v. Bine, 1 Dev. & Batt. Eq., 346; Mitchell v. Hazen, 4 Conn., 495; Little v. Paddleford, 13 N. H., 167; Watts v. Waddle, 1 McLean, 200; Greenwood v. Ligon, 10 Sm. & Marsh, 615; Taft v. Kessel, 16 Wis., 273; Lawrence v. Dole, 11 Vt., 549; Dodd v. Seymour, 21 Conn., 480; Pugh v. Chesseldine, 11 Ohio, 109; Morgan v. Smith, 11 Ill., 199; Hunter v. O'Neil, 12 Ala., 37; Freemster v. May, 13 Sm. & Marsh, 275; Dearth v. Williamson, 2 Serg. & Rawle, 498; Colwell v. Hamilton, 10 Watts, 415; Cunningham v. Sharp, 11 Humph., 120; Christian v. Cabell, 22 Gratt., 82; Tarwater v. Davis, 2 Eng. Ark., 153; Tindell v. Conover, 1 Zab., 654; Toll Bridge Co. v. Vreeland, 3 Green Ch., 157. *Contra*, Gazeley v. Price, 16 Johns, 267; Parker v. Parmlee, 20 Ib., 132; Tinney v. Ashley, 15 Pick., 552; Barrow v. Bispham, 6 Halst., 119; Hill v. Hobart, 16 Me., 164. See Brown v. Covilland, 6 Cal., 566; Delavan v. Duncan, 49 N. Y., 485. In Jones v. Gardiner, *supra*, the vendor agreed to give the vendee "a good and sufficient deed in law to vest him with the title of the said farm of land with the appurtenances." "The title," say the court, "meant the legal estate in fee, free and clear of all valid claims, liens, and incumbrances whatsoever. It is the ownership of land, the *dominium directum et absolutum*, without any rightful participation by any other person in any part of it. If the plaintiff's wife had a contingent life estate in one-third part of the farm, the defendant had not a clear and absolute title." The same was held in Porter v. Noyes, 2 Me., 22, where the vendor was "to make a warranty deed free and clear of all incumbrances," the court holding that the foregoing meant that the premises should be in fact free from incumbrances, which was not the case, there being an inchoate right of dower therein. It was held in Illinois that a covenant to make a general warranty deed was not a covenant against incumbrances. Bostwick v. Williams, 36 Ill., 65. As to the meaning of the words "the title to be a good and sufficient deed," see Brown v. Gammon, 14 Johns, 276. Story, J., in Powell v. Monson & Brimfield Manf. Co., 3 Mason, 347, said: "Nor am I prepared to admit the doctrine contended for at the bar that a covenant against incumbrances is broken by the mere existence of a

to ascertain whether the vendor can make a good title, it must be understood to mean a good title having regard to the terms of the contract.¹ In a contract for the purchase of a fee simple estate, if no incumbrance be communicated to the purchaser, or be known by him to exist, he has a right to presume that he is buying property which is unincumbered.² Where it is agreed that the contract may be rescinded if the title does not prove "satisfactory" to the purchaser, this will not authorize him to make other than the usual objections.³

§ 415. *Slight defects not regarded.*—Trifling objections will not constitute a defence to specific performance. As, the not having title to that which is not material;⁴ or a

possible incumbrance; and that therefore every deed containing such a covenant imports a contract to procure its extinguishment. A possibility of dower is not, within the sense of the covenant, an incumbrance; for that means a settled fixed incumbrance." It was held in Vermont that a covenant "to give a good and warranty deed," did not refer to the title, but to the instrument, and that the inability of the vendor to convey a title free of incumbrance did not constitute a breach. *Joslyn v. Taylor*, 33 Vt., 470. The same was held in *Preston v. Whitcomb*, 11 Ib., 47, where the vendor covenanted to make and execute "a good and authentic deed of conveyance." In the latter case, Redfield, J., dissenting, said: "I admit that when the contract is in terms for the execution of a deed of conveyance merely, the obligee must take the risk of the title, provided the party do not divest himself of the title which he had at the time of the contract. When, too, the contract in terms requires the execution of a deed with covenants, there may be reason to suppose the parties intended to look to the covenants as muniments of title. But when the contract expressly refers to the title to be conveyed, then the plaintiff, in order to recover when the covenants are dependent on each other, as in the present case, must not only aver a readiness to convey, but must prove his ability to convey such title as was contemplated by the parties."

¹ *Upperton v. Nickolson*, L. R. 6, Ch. 436.

² *Garnett v. Macon*, 6 Call., 309, 367; *Freer v. Hesse*, 21 Eng. L. & Eq., 82; *Salisbury v. Hatcher*, 6 Jur., 1051; *Hunt v. Saunders*, 1 Monr., 219; *Sturtevant v. Jaques*, 14 Allen, 523; *Swinhart v. Cline*, 19 Ind., 264.

³ *Lord v. Stephens*, 1 Y. & C. Ex., 222. Where a contract in writing for the purchase of certain land contained this clause, "the title on investigation to be satisfactory," and the purchaser notified the vendor that the title was not satisfactory, whereupon the vendor's agent, the vendor being a non-resident, said that the vendor would perfect the title, it was held not to be a case for specific performance at the suit of the purchaser. *Taylor v. Williams*, 45 Mo., 80. The attempt was to engraft the new promise upon the old one, and thus bring it under the protection of the written instrument, which could not be done. And, moreover, the proof did not establish with sufficient certainty the fact of a variation of the original contract, waiving the question of its competency.

⁴ *Bowyer v. Bright*, 13 Price, 698; *M'Queen v. Farquhar*, 11 Ves., 467; *Stewart v. Marquis of Conyngham*, 1 Ir. Ch., 573.

slight misdescription of the vendor's interest;¹ or the existence of insignificant liabilities;² or a right of way not affecting the beneficial enjoyment of the property.³ So, the mere possibility or a vague suspicion of a defect of title, will not release the vendee.⁴ Questions may arise with respect to the title which must depend upon circumstantial evidence; and after such questions are settled beyond a reasonable doubt, there is still a possibility of a defect. Yet this possibility is disregarded. Sometimes the court will presume the surrender of a term, or the discharge of a mortgage, in favor of the validity of the title.⁵ In the language of Lord Hardwicke, "the court must govern itself by a moral certainty; for it is impossible, in the nature of things, that there should be a mathematical certainty of a good title."⁶ A probability of litigation to render a title bad for this purpose, must be a reasonable probability.⁷ Thus, specific performance was decreed, although there was a reservation of mines, the court being satisfied that there was no subject matter for the reservation to act upon, or that the alleged right to exercise it had ceased.⁸ So, specific performance was granted against a purchaser, where the title depended upon the legality of a purchase by a solicitor from his client, although proof of the validity of the transaction was given in the absence of the client, who, it was argued, might have other evidence, and ultimately set the sale aside.⁹ Land, which belonged to a person deceased, having been sold at auction, the purchaser found, upon examining the title, that the estate had not been ad-

¹ *Forrer v. Nash*, 35 Beav., 167; *Howland v. Norris*, 1 Cox, 59.

² *Wood v. Bernal*, 19 Ves., 220; *Esdaille v. Stephenson*, 1 Sim. & Stu., 122; *Portman v. Mill*, 1 Russ. & M., 696; *Winne v. Reynolds*, 6 Paige Ch., 407.

³ *Oldfield v. Round*, 5 Ves., 508; *post*, § 427.

⁴ *Laurens v. Lucas*, 6 Rich. Eq., 217.

⁵ *Hayes v. Harmony Grove Cemetery*, 108 Mass., 400.

⁶ *In Lyddal v. Weston*, 2 Atk., 20. ⁷ *Cattell v. Corral*, 4 Y. & C. Ex., 237.

⁸ *Lyddal v. Weston*, *supra*; and see *Seaman v. Vawdrey*, 16 Ves., 393; *Martin v. Cotter*, 3 Jon. & L., 496.

⁹ *Spencer v. Topham*, 22 Beav., 573.

ministered upon; whereupon, letters of administration were taken out. There was no evidence tending to show that any debts existed against the estate, and the possibility that such might be the case, would be extinguished in two years. Moreover, by the terms of sale, half of the purchase money was to be secured by mortgage, which would amply secure the purchaser against such a possibility. It was held that there was not such a cloud on the title as to constitute a defence to a suit for specific performance against the purchaser.¹ A. sold land to B., with covenants of general warranty. The whole tract, out of which this piece was sold, had been previously purchased and a mortgage given thereon for the purchase money. The mortgage had never been recorded, and had not been released, though there were strong reasons for believing that the mortgage debt had been paid. It was held that A. was entitled to a decree against B., for specific performance.²

§ 416. *Presumption of title.*—When the title rests on a presumption, and, if the question were before a court of law it would be the duty of the judge to direct the jury to find in favor of it, specific performance will be enforced; but not if the evidence must be left to the consideration of a jury.³ The cases in which a doubt as to a fact has prevailed may be referred to this principle. As where the title depends upon proof that there is no creditor who can take advantage of an act of bankruptcy committed by the vendor;⁴ or where some evidence is produced by the vendor of the absence of notice of an incumbrance upon which want of notice the title depends;⁵ or where the presumption is derived from mere possession.⁶ Where there had been undisputed possession of the land during a period of sixty years, and a presumption was derived from a recital

¹ Hayes v. Harmony Grove Cemetery, *supra*.

² Richards v. Mercer, 1 Leigh, 125.

³ Emery v. Grocock, 6 Mad., 54; Barnwell v. Harris, 1 Taunt., 430.

⁴ Lowes v. Lush, 14 Ves., 547.

⁵ Freer v. Hesse, 4 De G. M. & G., 495.

⁶ Eyton v. Dicken, 4 Price, 303.

of deeds that they contained nothing adverse to the title, it was held that the mere loss of the deed did not create a reasonable doubt.¹ And where a title depended upon the fact that no execution had been issued upon certain judgments between given dates, and there was no proof of anything which could be referred to such an execution, the title was held good.² So, specific performance will be granted when the title depends upon the invalidity of a voluntary conveyance, as against a purchaser for a valuable consideration without notice; the court acting on the presumption that the conveyance has not been rendered valid by subsequent dealings.³ But specific performance will not, in general, be decreed in favor of a voluntary settlor against a purchaser, when the title depends upon the invalidity of the settlement.⁴ A difficulty in the way of assisting the plaintiff in such case "is, that he has no equity to defeat the act which he has done himself. But another consideration which has weighed in such cases, is, that if you compel a purchaser to take an estate at the instance of such a man, you cannot be quite sure that there may not have been some intermediate acts which, by matter *ex post facto*, may have made the settlement good, which in its origin was not good."⁵ But long possession of the purchaser, and other circumstances tending to show that he has acquired a good title, may give the vendor a right to insist on specific performance. Thus, on a bill by a vendor against a purchaser for specific performance, the defendant having set up a voluntary settlement as an objection to the title, it appeared that he had been in undisturbed possession

¹ Prosser v. Watts, 6 Mad., 59; Magennis v. Fallon, 2 Moll., 561.

² Causton v. Macklew, 2 Sim., 242.

³ Butterfield v. Heath, 15 Beav., 408; Buckle v. Mitchell, 18 Ves., 100. A gift to an unmarried woman for life, with remainder to her husband in fee, vests an indefeasible estate of inheritance in the person who first answers the description of her husband. And where in such a case the husband dies after devising his interest in the estate to his wife absolutely, and she sells, the purchaser will be compelled to take the title. Radford v. Willis, L. R. 7, Ch. 7.

⁴ Smith v. Garland, 2 Mer., 123.

⁵ Lord Eldon in Johnson v. Legard, T. & R., 294.

of the premises for twenty years, had paid part of the purchase money, satisfied a mortgage on the premises, and obtained a conveyance of the legal estate and possession of the title deeds, and it was held that the vendor was entitled to a decree.¹

§ 417. *Suspicious circumstances affecting title.*—Specific performance will not be enforced against a purchaser, when, although there is no proof of fraud, circumstances connected with the title raise a suspicion of it, and the good or bad faith of the transaction depends upon extrinsic circumstances. This was held where the title depended on a grant of chattels, which provided for the grantor's continuing conditionally in possession. The court, without determining whether such a deed was in itself fraudulent, and an act of bankruptcy, refused to compel the purchaser to accept the title, because its validity depended upon the question whether it was made for a good consideration and in good faith, and these were circumstances the purchaser had no means of ascertaining. "My opinion, therefore, is," said the vice-chancellor, "that a court of equity ought not to compel the purchaser to accept this title; because, assuming the deed not to be fraudulent *ex facie*, it still may be avoided by circumstances extrinsic, which it is neither in the power of the purchaser or of this court to reach."² But the doctrine that the possibility of fraud in extrinsic facts will be a sufficient objection to the title, has not been followed to its full extent. Thus, a title was held good under a deed, which might possibly have been proved invalid by extrinsic evidence, as embracing all the property of the grantor, or as made to give a fraudulent preference to some of several creditors, or as made in contemplation of bankruptcy; there being no apparent ground for making any of these objections.³ So, where the vendor claimed

¹ Peter v. Nicolls, L. R. 11, Eq. 391.

² Hartley v. Smith, Buck's Bankr. Cas., 368, per Sir John Leach.

³ Cattell v. Corral, 4 Y. & C. Ex., 228.

under an appointment made by a husband and wife to their oldest daughter, under a settlement giving them successive life estates, with remainder to their children as they should appoint, and, in default of appointment, between such children, and it appeared that the parents had encumbered their life interests, and that a short time after the appointment they and their daughter executed a mortgage, it was held that, although these circumstances raised a suspicion of fraud, which was strengthened by a notice from a younger son to the purchaser not to complete, and that the appointment was fraudulent, yet as the notice alleged nothing not apparent on the abstract, and was not followed by any proceedings, there was not a sufficient doubt to justify the court in withholding a decree for specific performance.¹ So, it has been held in England, that where there are no circumstances of suspicion, it is not a sufficient objection to a title made under a will, that the will has not been proved against the heir, or he does not join.² We are not aware that such an objection has ever been raised in this country. But here, the fact, without explanation, that a will of real estate, through which a title was derived, had never been proved, would doubtless be regarded by a purchaser unfavorably. A litigation under a will having continued thirteen years without impeaching its validity, and the contestant, who had claimed under another will, having withdrawn his opposition, the purchaser was compelled to take a title under the will.³ If a title, in the absence of special circumstances, be irregular, and such circumstances do not appear, specific performance will be refused.⁴

§ 418. *Where vendee has taken possession.*—The maxim of *caveat emptor* is a rule of the common law applicable to contracts of purchase as well of real as of personal

¹ Green v. Pulsford, 2 Beav., 71. And see M'Queen v. Farquhar, 11 Ves., 467; Grove v. Bastard, 2 Phil., 619; S. C. 1 De G. M. & G., 69.

² Colton v. Wilson, 3 P. Wms., 190; Morrison v. Arnold, 19 Ves., 670; Weddall v. Nixon, 17 Beav., 160.

³ McCulloch v. Gregory, 3 K. & J., 12.

⁴ Blacklow v. Laws, 2 Hare, 40.

property, and is adhered to both in courts of law and courts of equity, where the transaction is not fraudulent.¹ If a purchaser has taken a warranty deed, and been put in the undisturbed possession of the premises, without any fraud in the transaction, he cannot be relieved in equity before eviction, on the mere ground of defect of title, by having the contract rescinded, and the purchase money returned to him; his remedy being at law upon the covenant of warranty in his conveyance. But if he is in possession under a mere equitable title, as a title bond, or covenant to convey, and the vendor's title is defective, he may refuse to make payment, and have the contract rescinded, and such purchase money as he may have paid refunded.² And it has been held that the mere acceptance of a deed will not estop the vendee from controverting his grantor's title.³

§ 419. *Right of vendee to withhold payment in the absence of title.*—In this country, where title deeds are recorded and open to public inspection, when a contract for the sale of real estate is silent concerning the title, it is to be assumed that the title is good, and it is incumbent upon the vendee, if he questions it, to show the defect.⁴ A gen-

¹ A purchaser of real estate is not bound, in order to guard against deception on the part of the vendor, to have a survey made, unless some third person is in possession claiming title, or there is a dispute as to boundaries, or he has reason to suspect fraud. He may, in general, rely, as to location and boundary, on old deeds. *Walsh v. Hall*, 66 N. C., 233.

² *Buchanan v. Alwell*, 8 Humph., 516; *Walsh v. Hall*, *supra*. Although when the contract is executory, the vendee may obtain a rescission if the vendor has no title, yet where the contract is executed, eviction or fraud must be shown to enable a court of equity to grant relief to the purchaser, or to restrain the collection of the purchase money. *Patton v. Taylor*, 7 How., 133; *Campbell v. Medbury*, 5 Bissell, 33.

³ *Averill v. Wilson*, 4 Barb., 180; *Finn v. Sleight*, 8 Ib., 406; *Osterhout v. Shoemaker*, 3 Hill, 518; *Sparrow v. Kingman*, 1 N. Y., 245; *S. C.*, 12 Barb., 208; *Gaunt v. Wainman*, 3 Bing. N. C., 69; *Small v. Proctor*, 15 Mass., 499. *Contra*, *Hitchcock v. Harrington*, 6 Johns, 290; *Collins v. Torrey*, 7 Ib., 278; *Davis v. Darrow*, 12 Wend., 65; *Bowne v. Potter*, 17 Ib., 164; *Sherwood v. Vanderburgh*, 2 Hill, 307; *Gayle v. Price*, 5 Rich, 525; *Stimpson v. Thomaston Bank*, 28 Me., 259. If the vendee objects to the title, he must restore possession to the vendor. *Gans v. Renshaw*, 2 Pa. St., 34.

⁴ *Brown v. Bellows*, 4 Pick., 179; *Dwight v. Cutler*, 3 Mich., 56; *Allen v. Atkinson*, 21 Ib., 351. When the vendee of land, who is in possession, seeks to resist the payment of the purchase money, on the ground that his vendor cannot make a good title, for the reason that a paramount title is in a third person,

eral agreement to sell real estate is presumed to mean the fee simple, and equity will not compel a purchaser to take a life estate. Nor will he be obliged to take an estate in which the vendor had no interest as owner at the time of the alleged sale; for the reason, that one who speculates on that which is not within his control, is not a *bona fide* contractor, and there is no mutuality between the parties. But if the seller, though not the legal owner, has an equitable means to make himself so, and he employs that means successfully, though after his contract of sale, he may compel specific performance.¹ The vendor cannot rescind the contract of sale on account of delay of the purchaser in making payment, when the facts throw a cloud on the title and render it suspicious.² If there is an apparent incumbrance of record, the purchaser has a reasonable time in which to satisfy himself whether or not such incumbrance is valid. Thirty days is not an unreasonable time to take for this purpose, when the incumbrancer resides at a distance, and it does not appear that the situation of the parties has in the meantime been changed, or that anything has occurred to render the contract less fair and equal than it was when it was entered into.³ The court will not put the vendee off with the personal responsibility of the vendor, on a breach of the covenant for quiet enjoyment, but will suspend the payment of the purchase money until defects in the title are removed, and will, after a reasonable time, at the instance of the vendee, rescind the contract. It is a jurisdiction in the nature of specific performance, and, in the meanwhile, allowing the purchaser to hold to the security he has in the purchase money.⁴ But although

he must show affirmatively the existence of such paramount title by clear and satisfactory evidence. *Cantrell v. Mobb*, 43 Ga., 193; *Sawyer v. Sledge*, 55 Ib., 152.

¹ *Tiernan v. Roland*, 15 Pa. St., 429; *Leigh v. Huber*, 3 Watts, 367. A person cannot substitute himself as vendor in place of another, against the will of the vendee. *Taylor v. Porter*, 1 Dana, 421.

² *Snyder v. Spaulding*, 57 Ill., 480.

³ *Allen v. Atkinson*, 21 Mich., 351. See *post*, §§ 436, 442.

⁴ *Kindley v. Gray*, 6 Ired. Eq., 445; *Shaw v. Vincent*, 64 N. C., 690. When

when a vendor, acting in good faith, sells land to which he supposes he has a good title, on which the vendee enters and makes valuable improvements, and the vendor afterward ascertains that he cannot give a clear title, and there is no prospect that the title can be perfected, the vendee will be compelled to elect, without much delay, whether to receive a deed, or surrender the possession of the premises; yet if, with diligence, the title can eventually be cleared, the court will give relief by adapting its proceedings to the circumstances of the case.¹ The owner of land, at the time of entering into a contract for its sale, supposed that he owned the whole of it, but afterward discovered that he only had a title to an undivided sixth. The vendee, being apprized of this, agreed to go into possession until the vendor could obtain the entire property. Subsequently, the vendor got a title to three other undivided sixths; but the vendee refused to accept a conveyance of anything less than the whole. Upon a bill filed by the vendor for specific performance, it was held that the vendee must elect

the vendor covenants to give a title free from incumbrances, the purchaser is not bound to pay his money and receive a deed, while incumbrances exist against the property. *Bishop v. Newton*, 20 Ill., 175; *Wallace v. McLaughlin*, 57 Ib., 53. But a purchaser in possession, who by decree directing an inquiry as to title, and declaring the purchase money a lien on the estate, has been ordered to pay into court the interest on his purchase money, is not entitled to the dismissal of a bill for specific performance, although the plaintiff cannot show a good title, if it appear that the defendant, since the purchase, has acquired the means of curing the defect in the title. *Hume v. Pocock*, L. R. 1, Eq. 662.

¹ *Longworth v. Taylor*, 1 McLean, 395. The purchaser of a house in London, having objected to the title, the vendor, in 1869, filed a bill for specific performance, and obtained the usual reference as to title. The objections were overruled, but before the certificate had been signed, the purchaser discovered in a wall which formed one side of the house, and fronted on a street, a stone with an inscription dated 1776, stating that the wall was built by and belonged to the East India Company, which had thrown the adjoining ground into the street. It was ascertained that the wall was rebuilt in 1831, by the tenant of the house, and the stone reinserted; but under what circumstances, did not appear. No rent had from that time been paid to the company, nor any acknowledgment of their title given; but their successors, upon application made to them, claimed to own the wall, and the vendor obtained a release from them. It was held (overruling the decision of the vice-chancellor), that the vendor had not a good title when the bill was filed, he not having acquired a title by adverse possession, and that as he might, with reasonable diligence, have informed himself of the defect before selling, he was not entitled to costs. *Phillipson v. Gibbon*, L. R. 6, Ch. 428.

either to accept such a title as the vendor could convey, or abandon the contract and restore possession.¹

§ 420. *Time allowed vendor to make title.*—The vendor, to entitle himself to specific performance of a contract of sale, must show that, in good faith, and within the proper time, he has performed the obligations which devolved on him;² or that he is ready and desirous to do so.³ When a purchaser of land refuses to complete the purchase on account of an incumbrance upon the premises, he should state his objection to the vendor, in order that the vendor may have an opportunity to remove it.⁴ Mere delay, on the part of the vendor, will not deprive him of his right to enforce the contract, unless the delay has been unreasonable and without sufficient excuse, and it is out of the power of the court to place the parties in the condition they would have occupied if the contract had been carried out.⁵ A purchaser of real estate in possession under the contract, where the vendor is solvent, and the sale is without fraud, cannot enjoin a recovery of the purchase money on the ground that the vendor has not a good title. It is sufficient that he have such a title when the vendee by payment or tender of the purchase money places himself in a condition to demand a title.⁶ But although time be not of the essence of the contract, yet if a party, seeking specific performance, has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if, in the intermediate period, there has been a material change

¹ Davison v. Perrine, 22 N. J. Eq., 87.

² Watts v. Waddle, 6 Pet., 389.

³ King v. Hamilton, 4 Pet., 311; Grundy v. Ford, Litt. Sel. Cas., 129; Barnett v. Higgins, 4 Dana, 565; Seymour v. Delancey, 6 Johns Ch., 222. A person may enter into a contract to convey land to which he has no title, legal or equitable. When the time for performance arrives, he fulfils the obligation if he induces him who has the title to convey to the vendee. Rutland v. Brister, 53 Miss., 683.

⁴ McWhorter v. McMahan, 10 Paige Ch., 386. The purchaser must use reasonable diligence in ascertaining the state of the title. Havens v. Bliss, 26 N. J. Eq., 363.

⁵ Cooper v. Brown, 2 McLean, 495; McKay v. Carrington, 1 Ib., 50; Snyder v. Spaulding, 57 Ill., 480.

⁶ Blanks v. Walker, 54 Ala., 117; Hughes v. Hatchett, 55 Ib., 539.

of circumstances affecting the rights, interests, and obligations of the parties, equity will refuse its aid.¹ Where the receiver of a partnership offered the real estate for sale, and stipulated that the purchasers should have a perfect title, but there was a delay of about four months before a good title could be made, and the purchasers desired the property for immediate use, and were obliged to get other property in its place, it was held, in a suit for specific performance brought by the receiver, that the petition must be dismissed.² Specific performance will sometimes be decreed in behalf of the vendor, when he is prepared to comply with his covenants at the hearing, and the court will afford him a reasonable time to remove incumbrances and perfect his title;³ but not unless it can be done without prejudice to the rights of the vendee; nor where the defect to be remedied was known to the vendor or his attorney at the time of the contract, and was concealed from the purchaser;⁴ especially if the settlement of contested accounts is necessary to ascertain the state of the title.⁵ It has been held in numerous cases, that, when time is not of the essence of the contract, to give the vendor of real estate a right to specific performance, it is not necessary for him to show that he had a good title at the time fixed for conveyance, but that it is usually sufficient if he is able to give a good title at the time of the decree.⁶ But, although it is not a matter

¹ *Tiernan v. Roland*, 15 Pa. St., 429; *Funk v. McKeoun*, 4 J. J. Marsh, 162.

² *Parsons v. Gilbert*, 45 Iowa, 33.

³ *Dressel v. Jordan*, 104 Mass., 407. Where objections to the title arise during the progress of the suit for specific performance which were not made during the negotiations, the vendee will not be excused from performing, if the plaintiff is able and willing to remove them when first pointed out. *Dalzell v. Crawford*, 1 Pa. L. J., 155.

⁴ *Christian v. Cabell*, 22 Gratt., 82. Where a defect in the title of which the vendor's solicitor was aware, was not communicated to the purchaser, a motion by the latter to be relieved from the contract was granted, though the defect was removed previous to the motion. *Dalby v. Pullen*, 3 Sim., 29. See *Moroney v. Townsend*, 5 Phila., 357.

⁵ *Sidebotham v. Barrington*, 3 Beav., 528; *Foster v. Hoggart*, 14 Jur., 757; *Arnot v. Biscoe*, 1 Ves. Sen. 95.

⁶ *Hepburn v. Auld*, 5 Cranch, 262; *Hepburn v. Dunlop*, 1 Wheat., 179; 2 *Ib.*, 231; *Dubose v. James*, *McMullan Eq.*, 55; *Seymour v. Delancey*, 3 Cowen,

of course to dismiss a bill for specific performance merely because the title was not perfected at the commencement of the suit, yet that may be a sufficient reason for giving costs to the defendant, if he has not made any unreasonable objection to the title. Specific performance may be decreed, if it appears by the report of the master that a perfect title can be made at the time of making such report, unless the purchaser has been materially injured by the delay.¹ If a good title can be made at any time before the master's report, and even after the report, and the vendor can satisfy the court that he can make a good title by clearing up the objections reported by the master, the court will generally make a decree in his favor.² Where the vendor had procured a good title by means of an act of Parliament more than a month after the master's report, it was held that the purchaser could not be discharged from the

445; *Wilson v. Tappan*, 6 Ohio, 172; *Cotton v. Ward*, 3 Monr., 305; *Westall v. Austin*, 5 Ired. Eq., 1; *Mays v. Swope*, 8 Gratt., 46; *Luckett v. Williamson*, 37 Mo., 388; *Moss v. Hanson*, 17 Pa. St., 370; *Mussleman's Appeal*, 65 Ib., 480; *Allerton v. Johnson*, 3 Sandf. Ch., 72; *Brown v. Haff*, 5 Paige Ch., 235; *Winne v. Reynolds*, 6 Ib., 407; *Jenkins v. Fahey*, 73 N. Y., 355. In *Langford v. Pitt*, 2 P. Wms., 629, the master of the rolls said: "It is sufficient if the party entering into articles to sell has a good title at the time of the decree; the direction of the court being, in all these cases, to inquire whether the seller *can*, not whether he *could*, make a title at the time of executing the agreement. In the case of *Lord Stourton v. Sir Thomas Meers*, the Lord Stourton, at the time of the articles for a sale, or even when the decree was pronounced, could not make a title, the reversion in fee being in the Crown. And yet the court indulged him with time more than once for the getting in of this title from the Crown, which could not be effected without an act of Parliament to be obtained in the following session. However, it was at length procured, and Sir Thomas Meers decreed to be the purchaser. Indeed, it would be attended with great inconveniences, were decrees to direct an inquiry whether the contractor to sell had, at the time of entering into such contract, a title; for thus all incumbrances and defects must be raked into. Wherefore, it has been thought sufficient to answer the end, if, at the time of the decree or report, the seller can make a good title." Lord Eldon said that it was impossible to deny that, upon the old authorities, specific performance might be obtained, if the title could be made good before the report. *Jenkins v. Hiles*, 6 Ves., 646. In a subsequent case before the same chancellor, the motion of a defendant to be discharged because the master reported that a good title could not be made, was refused, the plaintiff having meanwhile obtained an act of Parliament to enable him to perfect the title. *Coffin v. Cooper*, 14 Ves., 205.

¹ *Dutch Church v. Mott*, 7 Paige Ch., 77.

² 2 Danl. Ch. Pr., 1195; *Seton v. Slade*, 3 Leading Cas. in Eq., 392; 72 Law Libr., 14. A defect of title may be cured at any time before decree, but the vendor must pay costs. *Lesesne v. Witte*, 5 S. C., 462; *Syles v. Kirkpatrick*, 9 Ib., 265.

contract.¹ When the sale is under a decree, the court can exercise at least as much discretion in affording the vendor time to perfect his title as in the case of private sales.² It having been discovered after the sale of an estate under a decree, and after a confirmation of the report of sale, that a small portion of the estate was the property of another person, the court refused to discharge the purchaser from his contract without giving the vendor an opportunity to acquire a title to that portion.³ But the party who is to convey will not be permitted to unnecessarily delay the conveyance. The purchaser may fix a reasonable time within which he will expect the title to be made at the peril of rescinding the agreement.⁴ Where more than half a year had elapsed after notice that the purchaser would not accept the title before the vendor was able to make a good title, even with the addition of a bond of indemnity against debts, the court said it could not see that it would be equitable to compel the purchaser to accept a conveyance, or to make an inquiry as to the vendor's present ability to give a clear title.⁵ But, in all cases, it is sufficient that a seller, upon a contract entered into in good faith, is able to make the stipulated title at the time when, by the terms of the agreement, or by the equities of the particular case, he is required to execute a conveyance.⁶ Where a vendor could not make title at the time stipulated in the bond, and the vendee remained in the uninterrupted possession of the premises, and had not paid the purchase

¹ Coffin v. Cooper, 14 Ves., 205.

² Daniel v. Leitch, 13 Gratt., 195.

³ Lechmere v. Brazier, 2 J. & W., 287. See Brown v. Haff, 5 Paige Ch., 235.

⁴ Thompson v. Dulles, 5 Rich. Eq., 370; Young v. Rathbone, 16 N. J. Eq., 224.

⁵ Richmond v. Gray, 3 Allen, 25. A vendee will not be compelled to receive the title, although he has performed so much of the contract as to give him a right to a conveyance, and is still in possession, if the vendor has neglected to make title until the circumstances respecting the property have materially changed. In a case of this kind, the vendee will be required to deliver up the land and account for the rents, upon the return to him of whatever he has paid toward the purchase money, with interest and the cost of improvements. Bryant v. Lofftus, 1 Rob. Va., 12.

⁶ Dressel v. Jordan, 104 Mass., 407; Thompson v. Myrick, 20 Me., 205.

money, it was held to be no objection to a decree for specific performance at the instance of the vendor.¹ Under a contract to convey land when a pending suit in relation to the title is decided, the vendor has all the time which may be necessary to close the litigation.² A contract was entered into for the sale of certain lots to a railroad company, the price to be determined by three persons chosen by the parties, a perfect title to be conveyed, and the purchase money paid within ten days after notice of the award. Although a deed containing a covenant against incumbrances was tendered within the ten days, yet there was a small mortgage on the property which was paid off eighteen days after the award and previous to the commencement of the suit. It was held that there was nothing in the omission to make a perfect title on or before the day fixed, to prevent a court of equity from decreeing specific performance of the contract, provided such title could be made at the rendering of the decree.³ Where a good title cannot be made at the time agreed, the vendor will be left in possession of the rents and profits until a good title is shown, and from that time he will have a right to the interest on the purchase money, and the purchaser to the rents and profits.⁴

§ 421. *Knowledge of vendee that vendor cannot make title.*—Of course, a contract for the purchase of real estate which is in fact owned by a third person, the legal title being merely held by the vendor as a security for a loan, cannot be specifically enforced, as the purchaser cannot be placed in a better position than the vendor.⁵ But knowl-

¹ Kennedy v. Wolfolk, 3 Hayw., Tenn., 190.

² Watts v. Waddle, 1 McLean, 200.

³ Viele v. Troy & Boston R.R. Co., 21 Barb., 381.

⁴ Lombard v. Chicago Sinai Congregation, 75 Ill., 271.

⁵ Franz v. Orton, 75 Ill., 100; Hill v. Fiske, 38 Me., 520; Love v. Cobb, 63 N. C., 324; Mills v. Van Voorhis, 23 Barb., 25. So, equity will not decree specific performance of a deed, by the administrator of the vendor who has executed a title bond to make a deed to the vendee upon proof that the purchase money had been paid, where it appears that the testator had made a valid sale

edge on the part of the purchaser, at the time of the contract, that the title is defective, will not deprive him of the right to equitable relief. A. sold land to B., and gave him a bond to make a good title in three years, B. knowing that the title was in the United States. B. agreed to pay for the land in cash, and real estate to part of which he had no title. The title to the land not being made by A. according to agreement, it was held that he must refund the money paid him by B., with interest, and pay B. the value of such of the land conveyed to him by B. as the latter owned.¹ Where a vendor, when he entered into a contract for the sale of land, could not make a good title, which was known to the vendee, and the latter took possession, which, however, he abandoned upon the failure of the vendor to complete at the time agreed, it was held that the fact that the vendee knew that the title was defective, was not a ground for compelling him to receive such title as the vendor could give.²

§ 422. *Defective title as to portion of subject of sale.*—With regard to that which is not absolutely essential to the enjoyment of the property, and is but a small adjunct to the purchase, the court, if a good title cannot be made to the adjunct, may direct an inquiry to ascertain whether it is essential to the enjoyment of the whole. If it is, the contract cannot be enforced, and the parties will be left to their remedy at law.³ But if it is not, the court will de-

of the same land prior to the giving of the title bond, of which the vendee had notice when he purchased. *White v. Gilbert*, 39 Miss., 802.

¹ *Rector v. Price*, 1 Mo., 373.

² *Jackson v. Ligon*, 3 Leigh, 161. But where the purchaser of land knew of an incumbrance upon it at the time of the purchase, he was compelled to take the title subject to such incumbrance, though it was not mentioned in the contract. *Winne v. Reynolds*, 6 Paige Ch., 407; and see *Vincent v. Berry*, 46 Iowa, 571.

³ *McKean v. Read*, Litt. Sel. Cas., 395; *Reed v. Noe*, 9 Yerg., 283; *Bellringer v. Blgrave*, 1 De G. & S., 63; *Tolson v. Sheard*, L. R. 5, Ch. D. 19. When a power to lease is exercised in excess of the power, an execution of the lease will not be compelled, unless the party is willing to take the lease to the extent of the power. *Harnett v. Yielding*, 2 Sch. & Lef., 548; *Neale v. Macenzie*, 1 Keen, 474.

cree specific performance.¹ Several parcels of land lying together having been sold at auction, the vendor delayed nearly three years to execute a conveyance, although repeatedly solicited to do so by the purchaser. It was afterward ascertained that the vendor had no title to one of the tracts, and the vendee refused to complete the purchase on that ground. In a suit brought by the vendor for specific performance, it was held that as it had not been shown that the purchase was chiefly with a view to that particular tract, the contract must be performed with a deduction of interest on account of the delay.² In many cases, where the title proves defective in part, or to an extent not very essential, specific performance will be decreed with a ratable deduction of the purchase money, by way of compensation for the deficiency. The good sense and equity of the law on this subject is, that if the defect of title, whether in lands or chattels, be so great as to render the thing sold unfit for the use intended, and not within the inducement to the purchase, the vendee ought not to be held to the contract, but left at liberty to rescind it; while, on the other hand, a defect which, though it may deprive the purchaser of a portion of the thing bargained for, still leaves substantially what he sought by the contract, should not acquit him of obligation to fulfil.³ Where a person bought several lots of land to two of which no title could be made, and it did not appear whether the lots were so connected as to render those to which there was no title necessary to the enjoyment of the others, Lord Kenyon said that both

¹ *Cunningham v. Sharp*, 11 Humph., 116.

² *Osborne v. Bremar*, 1 Dessaus Eq., 486. Where a person agreed to sell four lots for a certain sum in cash, and the residue in instalments, and, on the day fixed for the performance of the contract, the vendee tendered payment according to agreement, and demanded title to the lots, whereupon the vendor offered to give such title as he had, and admitted that he had no title to one of the lots (which facts were set forth in a bill for specific performance, and asking an accounting to ascertain the value of the lot), it was held that the bill was good on demurrer. *Mathews v. Patterson*, 2 How. Miss., 729.

³ *Evans v. Kingsberry*, 2 Rand, 20; *Stockton v. Union Oil Co.*, 4 W. Va., 273; *Foley v. Crow*, 37 Md., 51. This is the principle alluded to by Pothier, and repeated by Lords Erskine and Kenyon.

parties were to blame ; the purchaser, in resisting the contract *in toto* ; and the seller in insisting on it *in toto*. He said he was bound to suppose that the lots to which no title could be made were not of sufficient importance to make the loss of them a reason for vacating the agreement as to the remainder, and he accordingly decreed performance *pro tanto*.¹ A man having an estate for life in land, and his wife the remainder in fee, not subject to the control of her husband, he contracted to sell the fee. Afterward, the husband and wife united in conveying the fee to a third person who had full knowledge of the previous contract. It was held that the purchaser was entitled to have the interest of the husband conveyed to him, with compensation for the wife's interest.² Where, however, a husband and wife united in an agreement to convey the wife's estate in fee simple, which the wife subsequently refused to do, it was held that the purchaser could not compel the husband to convey his interest in right of his wife, he having only contracted with respect to the wife's estate.³ A. having entered into a contract with B. to sell him certain land, B. took possession, made valuable improvements, and paid part of the purchase money. It being afterward ascertained that A. had no title to a portion of the land, there having been a mutual mistake as to quantity, it was held that A. was bound to convey to B. the land actually owned by him, and make a ratable deduction from the price for the deficiency.⁴ Where a person contracted to sell the entire interest in property, and it was found that he only owned an undivided moiety, it was held that the purchaser was entitled to that moiety, with an abatement of one-half of the purchase money.⁵ Cases may occur in which the court

¹ Poole v. Shergold, 2 Bro. C. C., 118.

² Barnes v. Wood, L. R. 8, Eq. 424.

³ Castle v. Wilkinson, L. R. 5, Ch. 534.

⁴ Voorhees v. De Myer, 3 Sandf. Ch., 614.

⁵ Hooper v. Smart, L. R. 18, Eq. 683. See Western v. Russell, 3 V. & B., 187. But the vendor could not compel the vendee to take a less interest than he bargained for. Luckett v. Williamson, 31 Mo., 54. Where a person contracted for the sale of a house and lot, and title to only half of the property could be

will not compel the vendor to convey such estate as he can, but will act on the principle of not enforcing a contract the performance of which would be unreasonable, or prejudicial to persons interested in the property not parties to the contract.¹

§ 423. *When title to be taken with indemnity.*—Although equity will not force a vendee to take a defective title, it will compel him to take a good title subject to a pecuniary charge against which adequate security is given.² When compensation in money or by abatement from the price is inappropriate or inconvenient, the court will sometimes grant specific performance as far as it can be done, with indemnity against risk from the imperfect performance. This was done where the indemnity was against a small rent chargeable upon the premises in common with other property.³ So, the purchaser of a lease, with benefit of renewal, was held entitled to an indemnity against the risk of not obtaining the renewal, which, as shown in the particulars of sale, could not be assured to him by the vendor.⁴ Where land was sold free of incumbrances, and it was found to be subject to the right of dower of the vendor's wife, the vendee was held entitled to specific performance, and the court directed that a portion of the purchase money should be set aside sufficient to meet the contingency of dower as an indemnity, the vendor to be allowed the interest until the contingency determined.⁵ In another

obtained, it was held that specific performance should not be decreed. *Terrell v. Farrar*, Walk. Miss., 417. And one who contracted for six hundred and eighty-six acres of land, the title to two hundred and nine acres of which was found to be defective, was held not bound to take the residue. *Jackson v. Ligon*, 3 Leigh, 161. Where a person having a term agrees to sell the fee, although he cannot oblige the purchaser to take the term, yet the purchaser can compel him to convey it upon equitable conditions. *Wood v. Griffith*, 1 Swanst., 54. So of the sale of a fee by one entitled to the remainder in fee subject to a life interest. *Nelthorpe v. Holgate*, 1 Coll. C. C., 203.

¹ *Thomas v. Dering*, 1 Keen, 747. ² *Thompson v. Carpenter*, 4 Pa. St., 132.

³ *Halsey v. Grant*, 13 Ves., 73.

⁴ *Milligan v. Cooke*, 16 Ves., 1.

⁵ *Wilson v. Williams*, 3 Jur. N. S., 810. But where the alleged inchoate right of dower was questionable, the land being partnership property, it was held that unless the plaintiff was willing to take the title subject to the claim of the wife, and pay the stipulated price, he must resort to his legal remedy for damages sustained by the defendant's breach of contract. *Dixon v. Rice*, 16 Hun., 422.

case, the contract being for a lease with the usual covenants, and it appearing that there were mines under the demised premises to which the lessor had no title, it was held that he must execute the lease, with the usual covenant for quiet enjoyment.¹ Where a contract was entered into for the purchase of real estate for fifty thousand dollars, and it afterward appeared that there was a mortgage on it for one thousand dollars, which sum, with interest to the day of its payment, when it fell due the vendor offered to deduct from the purchase money, it was held that the incumbrance was not a ground for a refusal by the vendee to perform.² But the court cannot decree that the purchaser, instead of a perfect title, shall receive an imperfect one, and an indemnity against the title of a claimant;³ nor an indemnity against liabilities which endanger the possession; as where leasehold property is sold subject to the covenants in a superior lease, a breach of which will cause a forfeiture.⁴ So, the purchaser will not be compelled to take an indemnity against an outstanding judgment debt to the amount of half of the purchase money;⁵ nor to take an indemnity where there is a material variance between the particulars of sale and the property which cannot be made the subject of compensation.⁶

§ 424. *Waiver by vendee.*—The obligation of the vendor to make a clear title, being intended for the benefit of the purchaser, the latter may, of course, if he choose, waive any defect.⁷ Such waiver may be implied. If a purchaser of real estate, knowing of defects in the title, which are capable of being removed or compensated, goes into possession without objection thereto, it operates as a waiver.⁸

¹ Onion v. Cohen, 2 H. & M., 354.

² Guynet v. Mantel, 4 Duer, 86.

³ Bryan v. Read, 1 Dev. & Batt. Eq., 78.

⁴ Fildes v. Hooker, 3 Mad., 193.

⁵ Wood v. Bernal, 19 Ves., 220.

⁶ Ridgway v. Gray, 1 M. & G., 109.

⁷ Bennett v. Fowler, 2 Beav., 302. A person who, having a contract for the conveyance of real estate, permits the vendor to give a deed of trust of the property empowering the trustee to sell if required for the payment of certain debts, thereby waives all right to a conveyance, or at any rate subordinates such right to that of the trustee and his grantee. Preston v. Preston, 5 Otto, 200.

⁸ Guynet v. Mantel, *supra*.

The vendee may agree to take the land at his own risk, in which case the inability of the vendor to make a title will not justify the withholding of the purchase money.¹ But the purchaser will not be compelled to accept a defective title where he has taken possession of the property and made important changes in it, if it was agreed by the parties that he should enter before the examination of the title, and he abandons the premises as soon as he finds that a good title cannot be made.² Where there is no fraud, and both parties are acquainted with the contents and character of the instrument, it cannot be reformed in equity merely on the ground that one of the parties would have insisted upon, and been entitled to, a different instrument, if he had known what he afterward ascertained. Where, therefore, a person, under a parol agreement for the purchase of land with a good title and a deed of warranty, having paid the purchase money, is offered a deed without covenants, which he at first refuses to accept, but afterward takes a quit-claim deed, goes into possession, and makes valuable improvements, and an incumbrance on the property, unknown to both parties, is subsequently discovered, he is not entitled to equitable relief. In such a case the title to the land passes under the deed and the original contract is merged in it. After a contract has thus been

¹ *Brasher v. Gratz*, 6 Wheat., 528. When the vendor sells with all faults, and only such an interest as he has, the court will not direct an inquiry as to title. *Southby v. Hutt*, 2 My. & Cr., 207, 212. And see *Anderson v. Higgins*, 1 John. & L., 718. A proceeding in behalf of an administrator to sell the land of his intestate is a proceeding *in rem*, and a judicial sale to which the doctrine of *caveat emptor* applies. The purchaser buys at his peril, and, in the absence of fraud, mistake, or ignorance of any material fact, he must pay the purchase money, even though he get no title. *Burns v. Hamilton*, 33 Ala., 210; *Garrett v. Lynch*, 45 Ib., 204. Where land is conveyed without warranty, and there is no fraud or concealment of facts on the part of the grantor, the grantee cannot, in law or equity, recover back the purchase money upon the failure of title. *Botsford v. Wilson*, 75 Ill., 132; *Story's Eq. Juris.*, Secs. 140, 141. Although if a vendor conveys in fee land to which he has no title, and to which he afterward acquires title, the title thus acquired inures to the benefit of the vendee, yet this is not the case where a quit-claim is given, accompanied by an independent and qualified covenant of warranty against a specified adverse claim. *Quivey v. Barker*, 37 Cal., 465.

² *Richmond v. Gray*, 3 Allen, 25.

fully performed, there is no jurisdiction in equity to decree a second performance.¹ The vendee of land cannot put off the payment of the purchase money until a suit for eviction is determined, when the nature of the title on which such suit is based was fully communicated to him at the time of sale.²

¹ *Whittemore v. Farrington*, 76 N. Y., 452; *Bates v. Delavan*, 6 Paige Ch., 300, 307; *Burwell v. Jackson*, 9 N. Y., 535. See *Wilson v. Deen*, 74 Ib., 531. Where a purchaser of land, having the uninterrupted possession, by his own fault prevented the title from being conveyed, the court compelled him to perform the contract, although before the bill was filed he had obtained judgment for breach of covenant. *Hughes v. McKinsey*, 5 T. B. Mon., 38. If a contract for the sale of land clear of all incumbrances provides that it shall be forfeited if the purchaser fails to make his payments at the time agreed, and, the land being incumbered, the vendor cannot perform his part of the contract by giving a perfect title, a forfeiture cannot be declared upon failure of the vendee to meet his payments; but the latter may waive his right to a clear title, tender the balance due, and compel a specific performance of the contract. *Wallace v. McLaughlin*, 57 Ill., 53.

² *Boisblanc v. Markey*, 21 La. An., 721.

CHAPTER XIV.

NON-PERFORMANCE OF PLAINTIFF.

- 425. General rule as to the necessity of performance by plaintiff.
- 426. Fulfilment of promises made at the time of the contract.
- 427. Default of plaintiff in immaterial matter.
- 428. Non-performance of separate and distinct contract.
- 429. Unessential act not required.
- 430. Performance of part, and inability as to residue.
- 431. Where defendant has incurred liabilities for plaintiff.
- 432. In cases of marriage contracts.
- 433. Bankruptcy or insolvency of plaintiff.
- 434. Non-performance of condition.
- 435. When condition precedent relieved against.
- 436. Rule as to performance at time stipulated.
- 437. Relief against breach of condition subsequent.
- 438. Necessity of tender.
- 439. What deemed a sufficient offer to perform.
- 440. Tender of less than the amount agreed.
- 441. Payment into court.
- 442. Failure to perform or tender performance at day agreed.
- 443. When performance or offer to perform a condition precedent.
- 444. Where the undertakings of the parties are dependent.
- 445. Demand of performance.
- 446. Where a tender would be useless.
- 447. Offer to perform after commencement of suit.
- 448. Preparation and tender of conveyance.
- 449. Waiver of performance by vendor.
- 450. Waiver by vendee.

§ 425. *Performance or offer to perform in general to be shown.*—When a suit is brought for specific performance, it is often material to consider how far the corresponding obligations of the plaintiff have been fulfilled. If they have been disregarded, or are incapable of being substantially carried out, a court of equity will not interfere in his behalf.¹ This principle was partially discussed in the preceding chapter, with reference to the title, and as applicable more particularly to a vendor of real estate. The obviously reasonable proposition was there laid down and illustrated, that

¹ *Marble Co. v. Ripley*, 10 Wall, 339 ; *Brady's Appeal*, 66 Pa. St., 277 ; *Chambers v. Livermore*, 15 Mich., 381 ; *Crane v. De Camp*, 21 N. J. Eq., 414.

one who contracts for the purchase of land, is entitled to what he bargained for, before he can be compelled to part with the consideration he agreed to pay, and that the ability of the vendor to make a valid conveyance, should exist when his duty to do so arises under the contract, or at the time of a decree for a conveyance where time is not of the essence of the contract.¹ The same doctrine in its broader aspects, as embracing both parties to the contract, and a failure to fulfil on the part of either, from unwillingness as well as from inability, is now to be considered. It is a rule, subject to such qualifications as will be noted presently, that one who seeks to enforce a contract, is bound to show a performance, or a willingness and offer to perform, on his part, all that is called for from him by the contract, either then or thereafter; and that if he make default, it will be a defence to his suit.² The holder of a note, who had obtained

¹ *Buchanan v. Lorman*, 3 Gill, 51; *McKean v. Read*, Litt. Sel. Cas., 395.

² *More v. Skidmore*, 6 Litt., 453; *Clay v. Turner*, 3 Bibb., 52; *Boone v. Missouri Iron Co.*, 17 How., 340; *Garretson v. Vanloon*, 3 Iowa, 128; *Vennum v. Babcock*, 13 Ib., 194; *Greenup v. Strong*, 1 Bibb., 590; *Bearden v. Wood*, 1 A. K. Marsh, 450; *Logan v. McChord*, 2 Ib., 224; *Rogers v. Saunders*, 16 Me., 92; *Wright v. Delafield*, 23 Barb., 498; *Stewart v. Raymond*, 15 Miss., 568; *Tyler v. McCurdle*, 17 Ib., 230; *Earl v. Halsey*, 14 N. J. Eq., 332; *Thorp v. Pettit*, 16 Ib., 488; *Colson v. Thompson*, 2 Wheat., 336; *Hoen v. Simmons*, 1 Cal., 119; *Slaughter v. Harris*, 1 Ind., 138; *Satterfield v. Keller*, 14 La. An., 606; *Watts v. Waddle*, 6 Pet., 384; *M'Kinney v. Watts*, 3 A. K. Marsh, 268; *Wilson v. Brumfield*, 8 Blackf., 146; *Bryan v. Read*, 1 Dev. & Batt. Eq., 78; *Reed v. Noe*, 9 Yerg., 283; *West v. Case*, 3 Ind., 301; *Scott v. Shepherd*, 3 Gilman, 83; *King v. Knapp*, 59 N. Y., 462; *Hoover v. Calhoun*, 16 Gratt., 109; *Jackson v. Ligon*, 3 Leigh, 174; *Jordon v. Deaton*, 23 Ark., 704; *Stevenson v. Dunlap*, 7 T. B. Monr., 134; *Jones v. Roberts*, 6 Call, 187; *Harvie v. Banks*, 1 Rand, 408; *Frankfort, etc., Turnpike Co. v. Churchill*, 6 Monr., 427; *Hepburn v. Auld*, 5 Cranch, 262; *Kitchen v. Coffyn*, 4 Ind., 504; *Board of Supervisors v. Henneberry*, 41 Ill., 179; *Cox v. Boyd*, 38 Ib., 42; *Huldeman v. Chambers*, 19 Texas, 1; *Furbish v. White*, 25 Me., 219; *Stone v. Buckner*, 12 Sm. & Marsh, 73; *Jones v. Alley*, 4 Greene, Iowa, 181; *Snodgrass v. Wolf*, 11 W. Va., 158; *O'Brien v. Pentz*, 48 Md., 562; *Marburg v. Cole*, 49 Ib., 402. He who asks equitable relief must first do equity. *Secrest v. McKenna*, 1 Strobb. Eq., 356; *Richardson v. Linney*, 7 B. Mon., 571. "There are few cases in which a court of equity will insist on the maxim that he who seeks equity must do equity, with more rigor, than in those for specific performance." *Eastman v. Plumer*, 46 N. H., 464, per Sargent, J. The party who does not show himself prompt and eager to perform all that a contract requires of him, will not have a decree for specific performance in his favor. *Brown v. Haines*, 12 Ohio, 1. When two acts are to be done at the same time, neither party can maintain a suit against the other, without alleging performance or an offer to perform on his part. *Braswell v. Pope*, 80 N. C., 57. The rule that the instrument on which a party seeks relief in equity will not be specifically enforced unless it be supported by a meritorious consideration, neces-

judgment against the maker, agreed to assign such judgment to the indorser, if he would confess a judgment for the sum for which he was liable. The holder of the note having refused to make the assignment, in a suit to compel him to do so, it was held that, as there was no allegation by the indorser that he had paid the judgment so confessed, he was not entitled to the relief sought, payment of the money, and not the form of confession, being the essence of the contract.¹ Where a vendee of land gave to the vendor an order on a third person, and filed a bill for specific performance without payment of the order, it was held that he was not entitled to a decree, there being no proof that the vendor received the order in satisfaction.² A entered into a contract with B., for the purchase of land, and gave

sarily implies that specific performance of an agreement will not be enforced in equity, where the party seeking such relief has not performed the agreement on his part. *Burling v. King*, 66 Barb., 633. Where a railroad company agreed with the owner of land to leave it to arbitrators to determine what sum the company should pay for the right of way over his land, it was held that they were not entitled to the enjoyment of the easement until they had paid or tendered to him the sum awarded. *Stewart v. Raymond R.R. Co.*, *supra*. When a purchaser seeks specific performance, he must show that the contract was actually made; if negotiated between agents, that they were duly authorized; that there has been no unreasonable delay in performing or offering to perform; and that the contract is fair and reasonable. *Taylor v. Merrill*, 55 Ill., 52; *S. P., Fitch v. Boyd*, *Ib.*, 307. If a party applies for an injunction, or a *ne exeat*, or for a receiver to dispossess the defendant of the possession or control of his property, it is not sufficient to show that he may hereafter be in a situation to ask for a specific performance of the contract; but he must show a present right. In a case referred to by the reporter in 2 Dick., 497, Lord Thurlow is said to have denied an application for a *ne exeat* against a purchaser who was going abroad, because it did not appear by the bill that the complainant was then in a situation to make a good title to the land purchased by the defendant. And in *Morris v. McNeil*, 2 Russ., 604, Lord Eldon discharged a *ne exeat* upon that ground alone, saying that "unless the court can make it out to be quite clear that there must be a specific performance, it cannot grant the writ." In another case, plaintiff and defendant agreed to exchange farms; but the plaintiff was unable to complete the contract at the time fixed in consequence of an incumbrance upon his land; and it was held that a receiver of the rents of the defendant's land, could not be appointed before the removal of the incumbrance. *Baldwin v. Salter*, 8 Paige Ch., 473.

¹ *Caller v. Vivian*, 8 Ala., 903.

² *Wheeler v. McClain*, 3 Dana, 81. The relation of vendor and vendee in an executory contract for the sale and purchase of land, is substantially that of mortgagee and mortgagor, and governed by the same general rules. In both cases, the legal title to the land is held as a security for the debt, to be conveyed to the owner of the equitable title when the debt is paid. *Ellis v. Hussey*, 66 N. C., 501; *Jones v. Boyd*, 80 *Ib.*, 258.

his note for the purchase money. B. having pledged the note as security, A. purchased it from the pledgee at a discount. A decree for specific performance was refused, until the whole amount of the note was paid.¹ In another case, a vendor, who owned three notes for one hundred and twenty dollars each, which were given for the purchase of certain land, agreed to make title to the land to the vendee, if he would pay the notes. A third person, in whose hands the notes had been placed by the vendor as collateral security, delivered them as fully satisfied to the vendee in consideration of other securities to the amount of one hundred and fifty dollars. It was held not such a fulfilment on the part of the vendee as entitled him to specific performance.² Where the owner of a mine contracted to lease it for twelve months, in order that search might be made for minerals, it being agreed that the lessor should make a good title to one-half of the minerals discovered, and the lessees permitted other persons to make explorations and discoveries which added greatly to the value of the property, without offering to assist, it not appearing that the lessees were ready or able to do the necessary work in developing the mine, it was held that they were not entitled to a specific performance.³

¹ Taft v. Leavitt, Wright, 589.

² Daniel v. Hill, 23 Texas, 571. See Passmore v. Moore, 1 J. J. Marsh, 591; Doar v. Gibbs, 1 Bailey Eq., 371; Van Scoten v. Albright, 5 N. J. Eq., 1 Halst., 467; Denniston v. Coquillard, 5 McLean, 233. Where a vendor of land, and the administrators of the vendee, rescinded a contract made between the former and the intestate, after one of several notes given for the purchase money had been paid, and the unpaid notes were delivered to the administrators, it was held that the heirs of the intestate could not compel the vendor to perfect the title, unless they would pay the residue of the purchase money, the vendor promising that, upon such payment, he would fulfil the contract made by him with their ancestor. Strange v. Watson, 11 Ala., 324.

³ Cabe v. Dixon, 4 Jones Eq., 436. In a suit for specific performance it appeared that A. conveyed certain land to the defendant, who on the same day gave a bond to A. and B., who were partners, conditioned to reconvey the land to them upon their repayment of such advances as the defendant might thereafter make, and upon their cancelling all indebtedness to him, and all taxes on the land, which they were to occupy and improve for a specified period free of rent, provided they paid interest and taxes. The defendant advanced a considerable sum which was never repaid. Subsequently the defendant, at the request of one of the partners, bound himself by a written guaranty to pay a note of the firm, with the understanding that the defendant was to rely upon the land as security. A few months afterward the defendant took possession of the land for breach of

§ 426. *Fulfilment of acts promised, to be shown.*—It is incumbent on the plaintiff to show not only that he has performed, or is ready to perform, the terms of the contract itself, but also subsequent acts promised at the time of the agreement on the faith of which the contract was entered into, and which therefore constituted a part of the inducement. If it were otherwise, great injustice would often be done, as such promises frequently have a controlling influence in the transaction, without which the bargain would probably have fallen through. An owner of real estate, in contracting for its sale, represented that he would improve the access to the property, but not having done it, the court refused to decree specific performance against the vendee. And where the vendor, through his agent, told the purchaser that a church should be built in the immediate vicinity of the land sold, and that he would complete certain streets, neither of which was done, the court declined to compel the vendee to take the property.² The effect of the exhibition, at the time of the contract, of a map or plan of the premises, on the rights and obligations of the respective parties, will of course depend upon the mode and object of the exhibition, and upon what then transpired. If no allusion is made in the contract to any such map or plan, the court will not infer a binding promise, from the mere fact that a map or plan of the property was shown to the purchaser.³ On the same principle, a plan deposited, cannot be used in construing a special act of the Legislature, except so far as it

the condition of the bond. In a short time thereafter A. and B. were declared bankrupt, and an assignee appointed, who sold and conveyed all the rights of the bankrupts in the land to the plaintiff, who knew that the defendant claimed the sum paid by him on the note. It was held that the plaintiff could only have a decree by paying whatever A. and B. had agreed to pay before obtaining a reconveyance, which sum was in equity a charge upon the land in the hands of the defendant, and became a part of the debt which the plaintiff must pay, and that as he declined to do this, the decree of the court below dismissing the bill must be affirmed. *Love v. Sortwell*, 124 Mass., 446.

¹ *Beaumont v. Dukes*, Jac., 422.

² *Myers v. Watson*, 1 Sim. N. S., 523.

³ *Fooffees of Heriot's Hospital v. Gibson*, 2 Dow., 301; *Squire v. Campbell*, 1 My. & Cr., 459.

may be referred to in the act itself.¹ When a map, exhibited at the time of the contract, shows the proposed division of the property, the vendor cannot afterward divide the land in a way so different, as to attract a wholly different class of residents from that which would have located there, if the plan laid down on the map had been carried out.² But the map exhibited need not be strictly followed. Where the contract referred to a plan as a description of the property, and the plan represented the measurement and width of a street, but the agreement did not expressly refer to that part of the plan as binding, it was held that the party was not entitled to relief against an encroachment on the width of the street.³ So, where the particulars referred in general terms to an accompanying plan on which several roads were laid down so as to give frontages to all of the lots, and corresponding roads were marked out on the land itself, it was held that as the particulars and conditions of sale did not provide for any right of way beyond a road leading into the nearest highway, the purchaser was only entitled to such a road.⁴ When the plan exhibited, instead of showing a proposed future condition of the property, correctly indicates its then existing condition, it has been held that, in the absence of anything said or done by the vendor to mislead the purchaser, he will not be bound to make good the loss thereby resulting to the latter. Thus, where a plan represented a well on lot 4, communicating with a reservoir or lot 2, and that communicating with an inn on lot 1 which the plaintiff purchased, and the vendor conveyed lots 2 and 4 to a third person without reserving to the plaintiff a right to a flow of water from the well, the plaintiff's demand for compensation for the loss of the water was denied.⁵ But the foregoing decision, if sound, and it has been questioned

¹ *North British R.R. Co. v. Tod*, 12 Cl. & Fin., 722; *Beardmer v. London & Northwestern R.R. Co.*, 1 M'N. & G., 112.

² *Peacock v. Penson*, 11 Beav., 355, 361.

³ *Nurse v. Lord Seymour*, 13 Beav., 254.

⁴ *Randall v. Hall*, 4 De G. & Sm., 343. ⁵ *Fewster v. Turner*, 11 L. J. Ch., 161.

by high authority,' went to the verge of the rule; as the vendor seems to have taken advantage of what must have been inadvertence on the part of the plaintiff.

§ 427. *Literal performance not required.*—Although, when it is out of the power of the plaintiff to fulfil his part of the contract, he is not entitled to performance by the other party, on account of the failure of the consideration which was to have moved from him, yet when the plaintiff's incapacity has reference, not to the substantial, but only to the literal fulfilment of the contract, the court, looking beyond mere matters of form, will endeavor to do complete justice between the parties.² A. and B. entered into an agreement to exchange farms, and to execute to each other "good and valid conveyances, in the law, of the same," with covenants of seisin and warranty. The farm agreed to be conveyed by A. was parcel of a large tract of land granted by the proprietor of a manor, and was subject to a quit rent of fifty-four cents a year, which was well known to B. at the time he made the contract; and it was also a matter of public notoriety that all the lands in the manor were subject to such a quit rent. It was held that the existence of this rent was not an objection to a decree for specific performance.³ But the complainant must show that he has not been in default, and that he has taken all proper steps toward fulfilling on his part; and if the non-compliance does not go to the essence of the contract, relief will be granted.⁴ The

¹ Lord St. Leonards, Vend., 20.

² Davis v. Hone, 2 Sch. & Lef., 347; Counter v. MacPherson, 5 Moo. P. C. C., 83, 108; Orman v. Merrill, 27 Iowa, 476. A. agreed in writing to make certain advances to B. for building and furnishing a house on A.'s land, and, seventy days after its completion, to convey the house and other land to B., B. to supply all labor and materials, and build the house, and, upon delivery of the deed, to return to A. his advances with interest, and pay a certain price for the land either in cash, or by note payable in five years, secured by mortgage. It was held that although B. could not, four years after the contract, and two and a half years after A.'s death, elect to pay by note secured by mortgage, yet that, upon payment of the money, he was entitled to specific performance. Phillips v. Soule, 9 Gray, 233.

³ Ten Broeck v. Livingston, 1 Johns Ch., 357. *Ante*, §§ 415, 422.

⁴ McCorkle v. Brown, 9 Sm. & Marsh, 167. See Story's Eq. Juris., Secs. 771, 775.

principle is well settled, that where either party has performed a valuable part of his contract for the sale and purchase of real estate, and is in no default for not performing the residue, he is entitled to performance by the other party to the contract.¹ With reference to the vendor, if he is unable, from any cause, not involving bad faith on his part, to convey all the land contracted to be sold, but it appears that the part he cannot convey, is of small importance, or immaterial to the purchaser's enjoyment of that which can be conveyed to him, the vendor may insist on a performance with compensation to the purchaser, or an abatement from the agreed price. But this cannot be done when the defect extends to a considerable portion of the entire subject matter, or is material to the enjoyment of the part concerning which there is no defect.² So, a slight default on the part of the vendee, in the performance of work to be done by him before the deed is to be delivered, will not prevent a decree for specific performance in his favor, when the difference can be compensated in money.³ Where in an agreement by A. for the sale of property to B., it was stipulated that A. should continue tenant of the land from year to year, which, owing to his embarrassed circumstances, he could not do, it was held that this, from the determinable nature of the holding, was an inconsiderable matter, and therefore not a bar to a specific performance of the contract.⁴ An omission, by mutual consent, to perform some particular stipulation for such a length of time that neither would have a right to call upon the other to perform it, and the non-performance of that particular stipulation, if it does not appear to have affected the essential rights or interests of

¹ Hays v. Hall, 4 Porter, 374; Wynn v. Garland, 19 Ark., 23.

² Foley v. Crow, 37 Md., 51.

³ Hulmes v. Thorpe, 5 N. J. Eq. (1 Halst.), 415.

⁴ Lord v. Stephens, 1 Y. & C. Ex., 222. Courts of equity should exercise great caution in enforcing a partial performance of a contract of sale of real estate. Mills v. Van Voorhies, 20 N. Y., 412. If it is in the power of the grantor to fulfil his agreement, he will be compelled to do so, though there may be a conflict between the rights agreed to be granted, and other rights secured by a prior grant. Conant v. Canal Co., 29 Vt., 263.

the parties to the contract in other respects, will not defeat the right of the party whose performance of the contract has otherwise been complete, to a decree.¹

§ 428. *Default as to separate agreement.*—If a contract embraces the doing of several pieces of work mutually agreed to, the not doing of one of them will not affect the right of a party not in default to require performance of the remainder, when the rights and interests of the contracting parties as to what may actually be done will not thereby be impaired.² Where, besides the contract sought to be enforced, there is another separate though collateral contract, entered into at the same time, between the parties concerning the same subject matter, default of a party as to the latter will not bar a suit brought by him for the specific performance of the former.³ A. entered into a contract with B., who owned a plot of land, to erect a house on it, and to keep it insured in the joint names of A. and B. in a certain office, B., when the house was completed, to grant a lease of the plot to A., the agreement for the lease to be void if A. should not fulfil his part. It was further stipulated that A. should have the right to purchase the fee within two years. A. built the house, but insured in the wrong office, and in his name alone. A bill having been filed by A. under the option to purchase, specific performance was decreed, such option being held independent of the right to a lease, in respect to which the plaintiff had made default.⁴ In another case, A. agreed to let to B. several plots of land for ninety-nine years at a specified rent, to be apportioned as thereafter stated. B. agreed to build on plot C twenty houses, on plot D eight, on plot E ten, and

¹ Portland, etc., R.R. Co. v. Grand Trunk R.R. Co., 63 Me., 90. ² Ibid.

³ Phipps v. Child, 3 Drew, 709; Stewart v. Metcalf, 68 Ill., 109. A vendor cannot object to convey to a purchaser in parcels by separate conveyances at one and the same time if the purchaser requires him to do so, and pays him the additional expense he thereby incurs. But it is doubtful whether, in the absence of a stipulation to that effect, the vendor may not object so to convey at different times. Earl of Egmont v. Smith, L. R. 6, Ch. D. 469.

⁴ Green v. Low, 22 Beav., 625.

on plot F five ; and it was stipulated that a separate lease of plot D at a rent named should be granted as soon as four of the houses on that plot, and two of the ten houses on plot E, were inclosed, and that a separate lease of plot E should be granted as soon as five of the ten houses on that plot were inclosed. B. mortgaged this contract to the plaintiff, and afterward became insolvent. The plaintiff inclosed the requisite number of houses on plots D and E, and applied for leases of them, at the same time denying his liability to perform other parts of the agreement. It was held on appeal, reversing the decision of the vice-chancellor, that the plaintiff was entitled to leases of the two plots without assuming obligations under the entire contract.¹ So, in a deed for the dissolution of a partnership between A. and B., A. assigned to B. certain foreign shares, and covenanted for further assurance ; and B. covenanted with A. for indemnity against certain liabilities. A further assurance of the shares having become necessary, on a bill filed by B. to enforce specific performance, it was held that a breach by B. of the covenant to indemnify was no defence, the two covenants being independent, and the non-performance of one not being a ground for resisting the performance of the other.² Although a court of equity will sometimes refuse to decree spécific performance of the principal contract in violation of a collateral covenant restraining an assignment, yet it will not do so when it appears, on the face of the contract, that the prohibition to assign was not the main purpose of the covenant, but in the nature of a mere security for the performance of the principal covenants.³ But when the party applying for specific performance has made default in a collateral agreement or representation upon the faith of which the contract was entered into, the bill will in general be dismissed,

¹ *Wilkinson v. Clements*, L. R. 8, Ch. 96.

² *Gibson v. Goldsmid*, 5 De G. M. & G., 757 ; S. C., 18 Beav., 584.

³ *Grigg v. Landis*, 21 N. J. Eq., 494 ; S. C., 19 Ib., 350.

on the ground that a plaintiff seeking equity must do equity. If a contract in writing be executed upon the faith of a parol agreement adding to or varying the terms, the court may refuse to enforce the written contract unless the plaintiff will carry out the parol agreement.¹ Where a written contract was entered into for a lease, and it was separately agreed, by parol, that the lessee should pay a premium, it was held that he could not have specific performance unless he consented to pay the premium.²

§ 429. *Matters of form not regarded.*—Specific performance of an agreement will not be denied because of the failure of the complainant to do a merely formal act, when the facts in the case otherwise sustain the bill.³ An agreement was entered into for the conveyance of property, payment to be made by a deposit of the price in one of two banks in B., and a certificate to be delivered to the vendor. The deposit was made in a different bank in B., and a certificate of deposit offered to the vendor within a reasonable time, which was refused. Then a tender of the purchase money and interest was made, which was also refused. On filing a bill and paying the money into court, it was held a sufficient performance of the contract.⁴

§ 430. *Inability to fulfil strictly.*—Where the plaintiff has performed a substantial part of his contract, and the remainder has become impossible without his fault, the contract will not be enforced against the other party, unless the plaintiff is not *in statu quo* as to the part of the contract which he has performed. If he has done so much of his part that he cannot be restored to his former situation, and is in no default for not performing the residue, he may insist that the contract be carried out. For, as he entered upon performance in expectation of the equivalent he was to receive from the person with whom he contracted, there

¹ Clarke v. Grant, 14 Ves., 519; London & Birmingham R.R. v. Winter, Cr. & Ph., 57.

² Martin v. Pycroft, 2 De G. M. & G., 785.

³ Coale v. Barney, 1 Gill & Johns, 324.

⁴ Secombe v. Steele, 20 How., 94.

is no reason why the consequences of his accidental failure should fall upon him more than upon the other.¹ Where one agrees to locate land, and then convey his interest, and dies before the patent is issued, but not until he has so far performed his agreement, by selecting the land and procuring its location, that any other person could have advanced the money and obtained the patent, his heirs will be entitled to a decree for specific performance.²

§ 431. *Plaintiff required to discharge separate liability.*—On the principle that he who seeks equity must do equity, specific performance will sometimes be refused, notwithstanding the terms of the contract have been fully

¹ 2 Story's Eq. Juris., Sec. 772; Breckenridge v. Clinkinbeard, 2 Litt., 127; and see 1 Fonbl. Eq., Book 1, Ch. 6, Sec. 3; *post*, §§ 502, 504. On this subject, Chief Baron Gilbert, in his *lex prætoria*, pp. 240, 241, says: "It is to be noted that the plaintiff who exhibited his bill upon the foot of performing the bargain on his part, ought to show that he has performed all that is to be done on his part, or is ready to do it; for where any part which he should have performed is become impossible to be performed, at the time of exhibiting his bill, then he can have no specific execution, because he cannot specifically execute on his own part. As in the case of my Lord Feversham, which was on a marriage agreement whereby he agreed to settle the manor of Holmly on his wife and the heirs of their bodies, and clear it of incumbrances, and settle a separate maintenance on his wife, and likewise sell some pensions in order to make a further provision for his wife, and the issue of that marriage; and Sir George Sandys, the father-in-law, agreed to settle three thousand pounds per annum on the Lord Feversham for life, remainder to the wife for life, and so to the issue of the marriage. Lord Feversham cleared the manor of Holmly, settled it accordingly, and settled the separate maintenance, but did not sell the pensions, nor settle the further provisions. The wife died without issue, and the Lord Feversham preferred his bill to have the three thousand pounds per annum settled on him during his life. But it was decreed, because Lord Feversham was *in statu quo* as to all that part of the agreement which he had performed, and not having performed the whole, and the other parts being now impossible, and no compensation being possible to be adjusted for it, he had not title in equity to have performance of Sir George's part of the agreement, since such performance could not be mutual. But the issue of Lord Feversham might have been relieved, because in no default." Earl of Feversham v. Watson, Rep. Temp. Finch, 445; 2 Freem., 35. But if a man has performed so much of his part of the agreement, as that he is not *in statu quo*, and is in no default for not performing the residue, then he shall have a specific execution from the other party, of the agreement. As "if a man has contracted for a portion with his wife, and has agreed to settle on the wife and her issue lands of such a value free from incumbrance, and he sells part of his land to disincumber, and is going on to disincumber and settle the rest, then, if the wife dies without issue, because he cannot be *in statu quo*, having sold part of his lands, and there is no default in him, since he was going on to disincumber and settle the rest, therefore, the accident of the death of his wife doth not alter his right to his wife's portion." Ibid., referring to Meredith v. Wynn, Eq. Abr., 15; Gilb. Eq. R., 70; Prec. Ch., 312; 2 Vern., 448.

² Bell v. Warren, 39 Texas, 106.

carried out on the part of the plaintiff, until he discharges other obligations he is under toward the defendant.¹ Where the vendor gave his bond conditioned to convey certain land to another, and the purchase money was paid pursuant to the contract between them, but the vendor had meanwhile incurred liability for the vendee as surety, a decree for specific performance in behalf of the purchaser was refused, and the bill retained to allow the vendor to avail himself of his legal title to indemnify or reimburse himself for whatever he might be compelled to pay as surety.² In another case, there being a contract of sale on the payment of a specified sum on a certain day, and the money tendered at that time, and a refusal to convey unless the purchaser would also pay certain other sums which he owed, the court pursued the same course, and directed an account to ascertain what was the whole amount due, in order that provision might be made for its payment out of the sale of the land, if that should become necessary.³ A. gave B. an agreement in writing to convey to B. certain land provided B. should pay him six hundred dollars in three years, with semi-annual interest thereon, which sum A. had advanced for B. in the purchase of the land, and taken a deed of it as security. Ten days subsequently, A. and B. further agreed in writing that A. should hold the land not only as security for the six hundred dollars and interest, but for such other sums as A. might thereafter let B. have "for his note, or become holden for by indorsement, or otherwise for him"; and B. agreed to pay such indebtedness before the delivery of a deed, the same as if those additional sums had been incorporated in the original agreement. Afterward, further advances were made by A. to B., for which he took B.'s

¹ So when, from the change of circumstances, it would be unconscientious to enforce the contract strictly, the court will so modify it as to do justice so far as circumstances will permit, and refuse specific performance unless the party seeking it will comply with such modification. *Mechanics' Bank of Alexandria v. Lynn*, 1 Pet., 376.

² *Secrest v. McKenna*, 1 Strobh. Eq., 356.

³ *Walling v. Aiken*, McMullan Eq., 1.

notes. Subsequently B. assigned the original contract to C., who at the time knew of the additional indebtedness of B. to A., but supposed that he would be entitled to a conveyance upon the payment of the amount due under the first-named agreement. On a bill filed by C. against A., for specific performance, it was held that A. was not bound to convey the land, until his advances to B. under both agreements were paid.¹

§ 432. *Exception to rule as to performance by plaintiff.*—Marriage contracts form an exception to the general rule which requires the plaintiff, when he seeks a specific performance, to prove a fulfilment of the contract on his part; the issue of the marriage not in being at the time of such contracts having an interest in the subject, as well as the immediate contracting parties.² Accordingly, the heirs of the husband were compelled to settle a jointure, though the husband had not received the portion which the wife's father agreed to pay.³ If, however, it be clearly expressed in marriage articles that it is intended the covenants shall be mutually dependent, and they are so framed, such intention will prevail.⁴ So, a party in default, or his assignees, will not be entitled to the benefit of the contract of the

¹ Reeves v. Kimball, 40 N. Y., 299.

² Lloyd v. Lloyd, 2 My. & Cr., 204. See Dennison v. Gothring, 7 Pa. St., 175; Neves v. Scott, 9 How., 197; King v. Whitely, 10 Paige Ch., 465. This principle was commented upon by Lord Hardwicke in Harvey v. Ashley, 3 Atk., 611, in which he said: "There is a difference between agreements on marriage being carried into execution and other agreements; for all agreements besides are considered as entire, and if either of the parties fail in performance of the agreement in part, it cannot be decreed in specie, but must be left to an action at law. In marriage agreements it is otherwise; for, though the relations of the husband or wife should fail in the performance of their part, yet the children may compel a performance. If the mother's father, for instance, hath agreed to give a portion, and the husband's father hath agreed to make a settlement, though the mother's father do not give the portion, yet the children may compel a settlement; for non-performance on one part shall be no impediment to the children's receiving the full benefit of the settlement. So, if there be a failure on the part of the father's relations, it is the same."

³ Perkins v. Thornton, Amb., 502. See relative to the same doctrine, Hancock v. Hancock, 2 Vern., 605; North v. Ansell, 2 P. Wms., 618; Pyke v. Pyke, 1 Ves. Sen., 376; Ramsden v. Hylton, 2 Ib., 304; Campbell v. Ingilby, 21 Beav., 567; S. C., 26 L. J. Ch., 654.

⁴ Lloyd v. Lloyd, *supra*.

other party.¹ "If a woman were to contract for the settlement of an estate, which would give a benefit to the husband, and the latter were to contract for the benefit, and the wife make default on her part, that might be a case in which the wife should not be allowed to have the benefit of the husband's contract. But that would not affect the children. They must have the estate."² "The parties seeking a specific execution of such articles may be those who are strictly within the reach and influence of the consideration of the marriage, or claim through them; such as the wife and issue and those claiming under them; or they may be mere volunteers, for whom the settler is under no natural or moral obligation to provide, and yet who are included within the scope of the provisions in the marriage articles; such as his distant heirs or relatives, or mere strangers. Now the distinction is, that marriage articles will be specifically executed upon the application of any persons within the scope of the consideration of the marriage, or claiming under such persons; but not generally upon the application of mere volunteers. But where the bill is brought by persons who are within the scope of the marriage consideration, or claiming under them, there courts of equity will decree a specific execution throughout, as well in favor of the mere volunteers as of the plaintiff in the suit. So that, indirectly, mere volunteers may obtain the full benefit of the articles in the cases where they could not directly insist upon such right. The ground of the peculiarity is, that, when courts of equity execute such articles at all, they execute them *in toto*, and not partially."³ Where, however, by the course of events, there is a failure of the marriage settlement as to acts to be done by the wife, collaterals cannot enforce against the husband what is contracted to be done by him.⁴

¹ Mitford v. Mitford, 9 Ves., 87, 96; Basevi v. Serra, 14 Ib., 313.

² Lord Redesdale in Crofton v. Ormsby, 2 Sch. & Lef., 602, 603.

³ 2 Story's Eq. Juris., Sec. 986.

⁴ Savill v. Savill, 2 Coll. C. C., 721; Campbell v. Ingilby, 21 Beav., 579.

§ 433. *Bankruptcy or insolvency of plaintiff.*—On the ground that the plaintiff in a suit for specific performance must be ready and willing to perform on his part, if the vendor commit an act of bankruptcy, he cannot enforce the contract against his grantee.¹ On the same principle, if the bankrupt be the purchaser, he cannot enforce the contract, as the vendor could not be sure of being able to retain the purchase money when paid.² So, the assignees of a bankrupt cannot enforce a contract entered into by the bankrupt, unless they personally bind themselves by the same covenants the bankrupt would have entered into.³ And, in England, the vendor may compel the assignees to elect whether they will adopt or repudiate the contract of sale.⁴ It may be objected to a suit for specific performance that the plaintiff is insolvent.⁵ But the insolvency must be clearly proved.⁶ Where the contract is for a lease, it need not be proved that the plaintiff has taken the benefit of the insolvent act, or that he has surrendered his property for the benefit of his creditors. But it must be shown that the plaintiff, in consequence of his insolvency, is not in a situation to perform his covenants.⁷ If

¹ *Lowes v. Lush*, 14 Ves., 547. In England, "Upon the sale of a bankrupt's estate, he is usually made to convey and covenant for title. His covenants, however, are obviously of little value; and it would seem that he cannot be compelled to execute a conveyance. But the court of bankruptcy is empowered, upon the application of the assignees or of the purchaser, if the bankrupt shall not try the validity of the adjudication, or if there shall have been a verdict at law establishing its validity, to order the bankrupt to join in the conveyance; and if he do not execute it within the time directed by the order, then he, and all persons claiming under him, will be estopped from objecting to such conveyance; and all estate, right, or title which he had in the property will be as effectually barred as if such conveyance had been actually executed by him." *Dart's V. & P.*, 250, 251.

² *Franklin v. Lord Brownlow*, 14 Ves., 550.

³ *Sutton, ex parte*, 2 Rose, 86; *Willingham v. Joyce*, 3 Ves., 168; *Powell v. Lloyd*, 2 Y. & J., 372; *Weatherall v. Gearing*, 12 Ves., 513; *Brooke v. Hewitt*, 3 Ib., 253.

⁴ 12 and 13 Vict., Ch. 106, Sec. 146. See *Sims v. McEwen*, 27 Ala., 184.

⁵ *Crosbie v. Tooke*, 1 M. & K., 431. In *Price v. Assheton*, 1 Y. & C. Ex., 441, where the suit was brought for the specific performance of a contract to renew a lease, it being proved that the plaintiff was insolvent, the bill was dismissed, the court refusing to compel the defendant to accept an insolvent lessee.

⁶ *Neale v. Mackenzie*, 1 Keen, 474.

⁷ *Ibid.*, *Willingham v. Joyce*, *supra*.

the lessee has made valuable improvements under a covenant to renew, with a clause in the lease for renewal, his insolvency is a less serious objection.¹ In case of the assignment of the contract, the insolvency of the assignee would be a defence; but not that of the original contractor.² The felony of the plaintiff would prevent his enforcing the contract.³ A like result will follow when the vendor is plaintiff, and he is unable to prove the due execution of the deeds which constitute his title; or, in England, where the title deeds must be transferred to the vendee as muniments of title, when it is out of the vendor's power to do this in consequence of their destruction.⁴

§ 434. *Non-performance of condition.*—When the contract is conditional, the non-performance of the plaintiff may consist in the non-fulfilment of the condition. If the condition has been performed, the contract becomes absolute for all purposes, the same as if it had been originally made without reference to any contingency.⁵ But until the condition has been performed, the contract is incapable of being specifically enforced, and consequently the defence may rest on this ground. The condition may be precedent or subsequent. If it be a condition precedent, it avoids the estate by not permitting the estate to vest until the condition is literally performed. In case it be a condition subsequent, the non-performance defeats the estate by divesting the party of his title and the interest already vested; because its continuance is made to depend upon the performance of the act, or the happening of the stipulated contingency. This distinction is material, for the reason that a court of equity “can, upon principle, interfere with and control the effect of one species of condition and not of the other. A man enters into a contract,

¹ Hyde v. Skinner, 2 P. Wms., 197.

² Willingham v. Joyce, *supra*.

³ Regent's Canal Co. v. Ware, 22 Beav., 586.

⁴ Crosbie v. Tooke, *supra*.

⁵ Bryant v. Brush, 4 Russ., 1.

or makes a deed, or settlement, or a will (the instrument is immaterial), and he agrees to grant or devise an estate upon a condition which he declares must be performed before the person to be benefited can take it. No court of law or equity can have a right to say that the condition which is lawful in itself, and one the party had a right to impose, shall be dispensed with. In order to do this, the contract or act of the party himself must be annulled, and one, created by the court, put in its place. The principle whereon the court is to act in relation to conditions subsequent is widely different. In cases of this sort, if a breach or non-performance happens the effect of which is to work a forfeiture, or divest an estate, the court, acting upon the principle of compensation to the party for the injury sustained by the breach, will interpose and prevent the forfeiture. On account of the nature of conditions subsequent, they are said to fall within the lenient principle by which equity relieves against penalties; and the court will only give relief where compensation can be made in damages. There may even be cases of conditions subsequent unperformed, in which the court will not relieve from forfeiture on account of the difficulty of ascertaining with any degree of certainty the amount or adequacy of compensation to be allowed.”¹ No precise or technical words are required to make a condition precedent or subsequent. The construction must be governed by the intention of the parties. The same words have been construed both ways, and much has been made to depend upon the order of time in which the conditions are to be performed. If the act or condition does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if, from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee

¹ McCoun, V. C., in *Wells v. Smith*, 2 Edw. Ch., 78.

perform the act after taking possession, then the condition is subsequent.¹ Where the vendee covenanted to make payment on a day named, otherwise the contract to be void, and was prevented from doing so, but made a tender the following day, it was held a condition precedent against which the court could not relieve.² But a condition in a deed of real estate to a railroad company that they shall construct their road on the property within a specified time is a condition subsequent, and the title vests in the com

¹ *Underhill v. Saratoga & Washington R.R. Co.*, 20 Barb., 455. It is sometimes a question how far the contract of a railroad company is conditional upon its obtaining a charter. A company, previous to its incorporation, entered into a contract, conditional upon the passing of the act, to purchase certain land for four thousand five hundred pounds and pay for consequential damage to the land-owner's property, the company agreeing to construct a bridge over the railway, to make a deviation of the line, and other works, dependent upon the formation of the company. The act passed; but the road was abandoned, and the time for taking the land had expired. The court remarked that nine-tenths of the agreement had become impracticable in consequence of the abandonment of the railway; and, though it did not decide the point, it inclined to the opinion that the contract was conditional not only on the passing of the bill, but on the making of the railroad. *Webb v. Direct London & Portsmouth R.R. Co.*, 1 De G. M. & G., 521. And see, to the same effect, *Lord James Stuart v. London & Northwestern R.R. Co.*, *Ib.*, 721. *Contra*, *Hawkes v. Eastern Counties R.R. Co.*, *Ib.*, 737; S. C., 5 House of Lds., 331. In another case, a railroad company covenanted with a land-owner that, in the event of the passing of an act in the then present session for extending their powers, the company should, before entering on any part of the land, pay the owner four thousand nine hundred pounds for any portion of his land, not exceeding forty-three acres, which the company might require and take, and seven thousand one hundred pounds as landlord's compensation for damages caused by the severance. In a suit, brought by the land-owner against the company, it was held that the covenant was not for the payment of a given sum for the withdrawal by the plaintiff of his opposition, but a payment as purchase money and compensation for severance, to which the company was not liable when no land was required or taken, and no severance made. *Gage v. Newmarket R.R. Co.*, 18 Q. B., 457. And see *Edinburgh, Perth & Dundee R.R. Co. v. Philip*, 2 M'Q., 514. A party entitled to the performance of conditions precedent may, of course, waive them. *Beatson v. Nicholson*, 6 Jur., 620.

² *Wells v. Smith*, *supra*; *Aff'd.*, 7 Paige Ch., 22. In this case, the performance of a condition precedent on or before the particular day specified, was essential to the vendor's security. The deed of the lot was to be delivered on a specified day, and the purchase money to be secured by a bond and mortgage on the premises, and the purchaser was to build a house of a certain size and character on the land before that time, or pay one thousand dollars of the purchase money on that day, at his election. But he did neither; and, by the terms of the agreement, the vendor was not to give the deed and take the bond and mortgage in that event. Moreover, the purchaser had only paid for the use of the property. So that there was, in fact, no forfeiture, except the loss of a profitable speculation which the purchaser failed to avail himself of by his non-performance of the condition precedent. See *Edgerton, v. Peckham*, 11 Paige Ch., 352.

pany upon the delivery of the conveyance.¹ Where A. covenanted to convey to B. one-half of certain lands, "on the said B. being at one-half the expense for procuring the title," it was held that the payment of the expense, as it accrued, was a condition precedent, and that as B. had failed to fulfil it, he was not entitled to a decree for specific performance.² In a suit for the specific performance of a contract, it appeared that the defendant executed to the plaintiffs a writing in which he agreed that they might explore, bore, or in any manner test, certain land supposed to contain petroleum oil, and that, in case they found oil, or were satisfied that there was any there, he would grant a lease for one-fourth the net profits of all oil taken therefrom, or for one-fourth of the stock, if a company should be formed. It was held that the discovery of oil in sufficient quantities to warrant undertaking the business was a condition precedent to the execution of the lease by the defendant.³

§ 435. *Relief in case of breach of condition precedent.*—A court of equity may relieve against the breach of a condition precedent in the nature of a penalty. The substan-

¹ Nicoll v. N. Y. & Erie R.R. Co., 12 N. Y., 121; Affg. S. C., 12 Barb., 460.

² Hutchinson v. McNutt, 1 Ohio, 14.

³ Mendenhall v. Klinck, 50 Barb., 634. If land be sold subject to the completion of certain erections thereon, equity will not enforce specific performance before the fulfilment of the conditions. Whiting v. Gould, 2 Wis., 552. A vendor of real estate, having given his bond conditioned to execute a conveyance at a specified time after the payment of the last instalment, it was held that the purchaser was not entitled to specific performance of the contract until the money had been paid. Delassus v. Poston, 19 Mo., 425. So, where A. bought certain land of B., subject to an agreement that the property should be conveyed to C., upon his payment of a stipulated sum, it was held that A. could not be compelled to convey until C. had paid the whole purchase money. Gibson v. Milne, 1 Nev., 526. A father having deeded to his son a homestead in consideration that the son would support him for life, a reconveyance was decreed on account of the son's failure to fulfil his contract to give his father a comfortable support, without requiring the latter to refund the money paid by the son for taxes. Penfield v. Penfield, 41 Conn., 474. Where A. made a contract with B., his daughter's husband, by which B. was to cultivate A.'s land and provide certain things for A., and at his death have a complete title to the whole, and afterward B.'s wife drove A. out of the house, and B. went to A.'s house and cursed him, and A. removed to another place and sold the land, it was held that B. could not sustain a bill for specific performance, it being uncertain whether B. had complied with his part of the contract prior to A.'s removal. Southworth v. Hopkins, 11 Mo., 331.

tial difference which governs courts of equity in cases of conditions, is not whether the condition be precedent or subsequent, but whether compensation can or cannot be made.¹ But the court is not bound, in all cases where compensation can be made, to give relief. The party asking relief may have so conducted himself as to have lost all claim to its interposition. He may have refused to perform the contract, or have renounced all rights under it. When this is not the case, and it is equitable under the circumstances that relief should be given, it is competent for the court to give it. A circumstance which will always have great weight with the court is, that the condition has been in part performed; that the party has done in part what he was bound to do to entitle him to what he asks, and stands ready to make good the deficiency.² "Penalties, forfeitures, and re-entries, for conditions broken, are not favored in equity, and constitute a large branch of equitable relief. Usually, they are held to be securities for the payment of money, and the performance of conditions; and, where compensation can be made for non-payment and non-performance, equity will relieve against the rigid enforcement of the contract. This is upon the principle that a court of equity is a court of conscience, and will permit nothing to be done within its jurisdiction which is unconscionable. But it is not, therefore, to be supposed that a court of equity will lightly dispense with contracts made between competent parties, and substitute other agreements more in accordance with variable rules of right and conscience. Every presumption will be made in favor of such contracts, and they will be enforced according to the intention of the parties expressed and implied, unless it can be shown that thereby some hardship or wrong, not

¹ 2 Cruise Dig., 40; *De Forest v. Bates*, 1 Edw. Ch., 405. But see *Armstrong v. Wyandotte Bridge Co.*, *McCahon, Kans.*, 166; *Laning v. Cole*, 3 Green Ch., 229.

² *Chipman v. Thompson*, Walk. (Mich.) Ch., 405. See *Radcliffe v. Warrington*, 12 Ves., 326.

within the presumed contemplation of the parties at the time, will result from such enforcement.”¹ Where the language of an agreement can be resolved into a covenant, the judicial inclination is so to construe it. And hence it has resulted that certain features have ever been held essential to the constitution of a condition, in the absence of which it is not deemed to exist.²

§ 436. *Default in respect to time.*—When, on a sale of real estate, the parties do not appear to have made the time for the payment of the purchase money essential, the court will compel the vendor to convey, although the purchase money was not paid at the time agreed, if compensation can be made for the delay, and it seems to be conscientious that the property should be conveyed.³ If, however, payment at the time fixed is a material and essential part of the contract, unless the money be paid at the time stipulated, the obligation of the vendor to convey is at an end. But to this general doctrine there are many exceptions and qualifications.⁴ The broad ground of giving relief as a rule, where a forfeiture has been occasioned by the non-payment of money at the stipulated time, upon an offer to pay the same and accrued interest, has not been fully sanctioned by the English courts.⁵ When parties have deliberately, by their agreements or covenants, fixed a

¹ Scudder, J., in *Grigg v. Landis*, 21 N. J. Eq., 494. See *Livingston v. Tompkins*, 4 Johns Ch., 431; 2 Story's Eq. Juris., Secs. 1314, 1316.

² *Paschall v. Passmore*, 15 Pa. St., 295. A conveyance of real estate subject to certain mortgages thereon, “to be assumed and paid by the grantee, his heirs and assigns, the same making part of the consideration,” on the condition that the grantor and his representatives shall be forever indemnified and saved harmless from the payment of such mortgages, is a conditional grant, and not in the nature of a mortgage from the grantee to the grantor. *Hancock v. Carlton*, 6 Gray, 39.

³ *Clark v. Lyons*, 25 Ill., 105; *Snyder v. Spaulding*, 57 Ib., 480; *post*, § 467. Vendee relieved from a forfeiture where he neglected to pay the interest due on a mortgage against which he had agreed to indemnify the vendor, upon payment of the mortgage debt, interest and costs. *Sanborn v. Woodman*, 5 Cush., 36. See *ante*, § 419.

⁴ *Hall v. Delaplaine*, 5 Wis., 206. See *White and Tudor's Leading Cases in Equity*, 3.

⁵ See *Hancock v. Carlton*, *supra*.

time for the performance of an act, a court of equity will be very cautious how it interferes in disregard of it, and thus, in effect, change the contract which the parties have made. It will not do this, unless, by reason of mistake, or some other cause falling within the legitimate powers of a court of equity, it shall see that justice demands the exercise of its jurisdiction irrespective of the lapse of such time. But if a party, who insists upon exact time, has himself been the cause of delay, a court of equity will, notwithstanding, decree specific performance.¹ The vendor is not entitled to forfeit the contract as against the vendee, when he is himself in no condition to perform;² even though by the terms of the contract he has the right to declare it forfeited, and to retain what has already been paid, if the vendee makes default.³ But the party seeking relief from a forfeiture, must show that circumstances which exclude the idea of wilful neglect or gross carelessness, have prevented a strict compliance, or that it has been occasioned by the fault of the other party, or that a strict compliance has been waived.⁴ Where a bond was given to convey real estate upon the payment by the purchaser of certain notes, and, if they were not paid according to their tenor, the bond was to be void, and default was made in such payment in consequence of the severe illness of the purchaser and his inability to attend to his business, and the vendor had sustained no loss which would not be compensated by the accrued interest, specific performance was decreed.⁵

§ 437. *Relief in case of breach of condition subsequent.*—It has been the invariable practice in equity to relieve against forfeitures arising from the breach of conditions

¹ Potter v. Tuttle, 22 Conn., 512; Savage v. Brocksopp, 18 Ves., 335; *post*, § 461.

² Converse v. Blumrich, 14 Mich., 109.

³ Wallace v. McLaughlin, 57 Ill., 53.

⁴ Jones v. Robbins, 29 Me., 351; Hipwell v. Knight, 1 Y. & C. Ex., 415; Brashier v. Gratz, 6 Wheat., 533.

⁵ Jones v. Robbins, *supra*.

subsequent, where compensation can be made for the failure of precise performance.¹ If land be conveyed subject to a mortgage, a covenant by the grantee that he will indemnify the grantor therefrom, principal and interest, is broken by a neglect to pay the interest; and, after a re-entry by the grantor for breach of the condition, a tender by the grantee of the principal and interest with an offer of indemnity will not constitute a defence to a suit to enforce the forfeiture. But if the grantee's default was not wilful, a stay of proceedings may be ordered on payment of the mortgage debt, interest and costs.² Real estate was devised to the sons of the testator, on condition that they should pay to each of his daughters three hundred dollars within a year after his decease. The devisees having failed to pay the amount within the year, the heirs at law became entitled to the estate. On a bill in equity, filed by the devisees, alleging a tender of the money, and praying for title to the lands, the breach of the condition was relieved against.³ Where a contract for the sale of

¹ Popham v. Bampfild, 1 Vern., 79; Woodman v. Blake, 2 Ib., 222; Walker v. Wheeler, 2 Conn., 299. Although, by the terms of a lease, it is provided that if any of the covenants on the part of the tenant are broken, the unexpired term shall cease and determine, yet, if the lease also contains a clause that in case of non-performance of such covenants the landlord may re-enter, the lease is voidable only at the election of the landlord, but not void. Stuyvesant v. Davis, 9 Paige Ch., 427.

² Sanborn v. Woodman, 5 Cush., 36. The proceedings in the foregoing case were at law by a writ of entry.

³ Walker v. Wheeler, *supra*. In this case it was argued that a much larger estate was given by the testator to his sons than to his daughters, and that, as the sons had failed to perform the condition, and had thereby lost their title at law, the estate ought to be divided among the heirs, so that the daughters would get their share; that it was unreasonable that a court of equity should interfere and take away the legal estate from the daughters, and give it to the sons, who had a less equitable right, as they had already received a much larger share of the property than the daughters. Swift, Ch. J., said: "In these cases courts of equity cannot be governed by such considerations. It is a fundamental principle of law and equity that every man has a right to dispose of and give away his property after his decease, in such manner as he may think proper, provided he conforms to the rules of law, and the will of the testator must be pursued and carried into effect if legally expressed. Here the intent of the testator was to give the lands to the sons; and, though they have not literally complied with the conditions of the devise, so that the estate is gone at law, yet a court of equity, by well-known and long-established rules, is now as much bound to regard the intent of the testator, and to give it effect, as a court of law would have been had the conditions of the devise been performed. No injustice, then, is done in tak-

real estate is clear, certain, fair, and mutual, valuable improvements made, a large part of the purchase money paid, the premises in the possession of the purchaser a long time, and no change in the condition of the property, the vendee will be entitled to specific performance, although he did not make his last payment at the time specified in the contract, which provided that if the vendee made default, the vendor should be discharged from the agreement, and the purchaser forfeit all his previous payments.¹

§ 438. *Plaintiff required to show that he is ready to fulfil.*—Under the rule that a person who seeks specific performance must himself be ready and willing to perform, the question of tender arises.² When the bill is filed by the vendor, he must show a tender of title and an offer to fulfil on his part.³ So, a tender of the purchase money

ing the estate from those who have the legal title; for this is carrying into effect the intent of the testator, who had an indubitable right to dispose of his estate in this manner. The present case is free from doubt, and the relief sought is entirely conformable to good conscience." *Ib.*, per Hosmer, J.

¹ *Edgerton v. Peckham*, 11 Paige Ch., 352. A forfeiture for breach of a condition subsequent in a deed of land, by the terms of which certain mortgages are to be assumed and paid by the grantee, his heirs and assigns, and the grantor indemnified and saved harmless from the payment thereof, will be relieved against in equity, unless there has been laches on the part of the grantee. *Hancock v. Carlton*, 6 Gray, 39. Covenants in a deed prescribing the mode in which the property shall be improved, and in restraint of the use which shall be made of it, will be sustained where the restriction is confined within reasonable bounds, and the party in whose favor they are made is interested in the subject matter of the restriction. *Brewer v. Marshall*, 18 N. J. Eq., 337; *Grigg v. Landis*, 21 *Ib.*, 494; *Whatman v. Gibson*, 9 Sim., 196; *Western v. McDermot*, L. R. 1, Eq. 499; S. C., L. R. 2, Ch. 72; *Mitchell v. Steward*, L. R. 1, Eq. 541; *Barrow v. Richard*, 8 Paige Ch., 351. The court in adjudging specific performance of an agreement for a lease may direct the lease to be dated at a time antecedent to alleged breaches, in order to give an action upon the covenants. *Mundy v. Joliffe*, 5 My. & Cr., 167; *Pain v. Coombs*, 1 De G. & J., 34; *Noonan v. Orton*, 21 Wis., 283.

² The distinction between a suit for specific performance in equity and an action at law for damages for non-performance, is this, that in the latter the right of action grows out of a breach of the contract, and a breach must exist before the commencement of the action; while in the former the contract itself, and not a breach of it, gives the action. *Bruce v. Tilson*, 25 N. Y., 107.

³ *Hodges, ex parte*, 24 Ark., 197; *Mix v. Beach*, 46 Ill., 113; *McHugh v. Wells*, 39 Mich., 175. The vendor must show that he has tendered a good and sufficient deed before he can enforce the contract. *Sowle v. Holdridge*, 63 Ind., 213. Where the purchaser of land assigns his contract before payment becomes due, and the assignee neglects to pay before the vendor files his bill for specific performance, it is proper for the latter to tender a conveyance to the original purchaser. *Corbus v. Teed*, 69 Ill., 205. Whether it is incumbent on the ven-

must be made by the vendee before a conveyance can legally be required.¹ A verbal contract for the sale and purchase of land provided that the vendee should pay one thousand dollars down, and four thousand dollars in two months thereafter, with interest at two per cent. a month, and the time for payment had elapsed. It was held that to entitle the vendee to specific performance, he must show that he had paid or tendered the whole amount with the interest.² Presumption of payment arising from lapse of time is not sufficient to entitle one to specific performance

dor to tender a conveyance before a tender of the purchase money, *query*, *Scarlett v. Stein*, 40 Md., 512. A. sold land to B., gave bond for title, and took B.'s notes for the purchase money. B. did not pay the notes when due, and A. sold the land to C., with notice of the sale to B. B. filed a bill offering to pay the notes, and demanding title. Specific performance was decreed on payment of the notes, though the decision would have been different if A. had offered to comply with his part of the contract before selling to C. *Hines v. Baine*, 1 Sm. & Marsh Ch., 530. A vendor who, when the purchase money is tendered, the property then being worth more than the price agreed upon, refuses to convey, and, after waiting until the property has depreciated below that amount, offers to fulfil, will not be entitled to the aid of a court of equity to compel specific performance. *Tobey v. Foreman*, 79 Ill., 489. An action by the executors of a deceased vendor, to foreclose a lien for the purchase money, under a contract for the sale of land, cannot be maintained, without alleging and showing that they have the title to the land, and that they tendered a deed, or were willing, able, and ready to give one. *Thompson v. Smith*, 63 N. Y., 301. Although the vendor has a lien for the unpaid purchase money, yet, if he require the aid of the court, he must bring a suit and get the lien declared against all who are interested in the estate, or, at least, against all persons who are subsequent to him in date, and who will be foreclosed by his decree. Where, therefore, a decree for the specific performance of a contract of sale had been obtained by the vendor against a railroad company, in which the amount due for damages and costs were directed to be ascertained, and such amount, when found, together with the purchase money, to be paid, it was held that the vendor could not enforce a lien on the land for the sums due, as against incumbrancers, not parties to the suit, whose rights would be affected by such lien. *Atty.-Genl. v. Sittingbourne & Sheerness R.R. Co.*, L. R. 1, Eq. 636.

¹ *Huff v. Jennings*, *Morris* (Iowa), 454; *Bearden v. Wood*, 1 A. K. Marsh, 450; *Greenup v. Strong*, 1 Bibb., 590; *McComas v. Easley*, 21 Gratt., 29; *Heuer v. Rutkowski*, 18 Mo., 216; *Irvin v. Bleaksley*, 67 Pa. St., 24. See *Tanner v. Peck*, 1 Barb. Ch., 549; *Brillinger v. Kitts*, 6 Barb., 273; *Beebe v. Dowd*, 22 Ib., 255; *Lanning v. Tompkins*, 45 Ib., 308; *Chase v. Hogan*, 3 Abb. Pr. N. S., 59; *Goodale v. West*, 5 Cal., 339. To stop the payment of interest a tender of the purchase money must be kept good, and the money not be used by the vendee for other purposes. *Bissell v. Heyward*, 6 Otto, 580.

² *Hoen v. Simmons*, 1 Cal., 119. It is not necessary in all cases for a plaintiff to perform or offer to perform fully on his part, in order to maintain a suit for specific performance. Equity will not require of him as a condition precedent to his filing a bill, that he should have made payments which he could not make with safety and justice to the rights of others. *Kellogg v. Lavender*, 9 Nebr., 418.

of a contract to convey land.¹ Where the vendee of land, as a part consideration for the purchase money, agreed to work for the vendor for a period of time, but neglected to do so, and tendered a sum of money after the time fixed for the execution of the deed as an equivalent for the non-performance of the labor, it was held that he was not entitled to a specific performance of the contract, unless he was prevented from doing the work by the vendor.²

§ 439. *What a sufficient tender.*—With regard more particularly to what constitutes an offer to perform, it is sufficient, in general, that a party has made a *bona fide*, reasonable, and earnest effort to fulfil; and the court will disregard technical objections on the other side which have the appearance of an attempt to get rid of the contract. Where the complainant, in his bill for the specific performance of an agreement for the exchange of land, showed that he notified the other party to meet him and exchange deeds at the place designated for the purpose in their contract, and that he was there accordingly with his deed, which he left to be delivered to the other party, who had not made his appearance, it was held that it was a sufficient tender and request.³ A tender of payment, in order to dis-

¹ *Morey v. Farmer's Loan & Trust Co.*, 14 N. Y., 302. In this case the vendee of lands, who had been sued in ejectment, filed his complaint against the holder of the legal title to compel the execution of a conveyance, on the ground that the vendee had performed the contract on his part, and was equitably entitled to the relief demanded. There was no evidence of actual payment of the purchase money; the vendee relying upon the legal presumption of payment. His complaint was dismissed, for the reason that he could not avail himself of the statute presumption to raise an equitable title in him. And see *Lawrence v. Ball*, 14 N. Y., 477. Specific performance will not be decreed of an agreement to convey land when the plaintiff shows no compliance or offer of compliance on his part with the agreement, nor any excuse therefor, for the period of twenty-one or twenty-two months from the time he bound himself to perform. *Green v. Covilland*, 10 Cal., 317.

² *Brewer v. Thorp*, 3 Ind., 262. When real and personal property are sold together under one contract for a gross sum, the whole sum is chargeable to the real estate, and the whole of the purchase money must be paid or tendered before conveyance will be decreed. *McComas v. Easley*, *supra*.

³ *Daily v. Litchfield*, 10 Mich., 29. In general, the acceptance of a deed for land is to be deemed *prima facie* completion of an executory agreement to convey, and thenceforth the agreement becomes void, and the rights of the parties are to be determined by the deed, and not by the agreement. Covenants collateral to the deed are exceptions to this rule, and cases may occur in which the

charge the conditions of a contract, may be made at any hour of the day fixed for its performance, when it would not be unreasonable to require the party to whom the tender is made to accept payment. It would be sufficient if made at night before the party has retired to rest, and under circumstances which would not impose inconvenience or risk upon him.¹ Where a purchaser of land, on the day for making payment and delivery of the deed, sought, but could not find the vendor, and, believing that she was intentionally evading his tender of payment, he deposited the money in a bank at six o'clock in the evening, and on his way home, after such deposit, met the vendor, who tendered the deed, and demanded the money, which the vendee was unable to pay, it was held that the latter was entitled to a decree for specific performance.² Partnership articles provided that no partner should sell the shares except as follows: To his partners collectively; in case they should decline, to the partners desirous of collectively pur-

giving of a deed will constitute but a part performance of the contract. An executed contract supersedes all prior negotiations and agreements, where the last contract covers the whole subject embraced in the prior one. But where the stipulation is to do a series of acts at successive periods, or distinct and separable acts simultaneously, the executory contract becomes extinct only as to such of its parts as are covered by the conveyance. *Long v. Hartwell*, 34 N. J. L., 116, per Van Syckel, J.

¹ *McClartey v. Cokey*, 31 Iowa, 505. Where the vendor made ineffectual efforts to find the vendee and tender the deed at the time agreed, it was held that he was entitled to specific performance. *Buess v. Koch*, 10 Hun., 299.

² *Hall v. Whittier*, 10 R. I., 530. A party has the whole of a day agreed on in which to perform the contract. A purchaser refused to complete because the property sold was incumbered by a mortgage, and the vendor, with the knowledge of the purchaser, met the holder of the mortgage by appointment to cancel the mortgage whenever the purchase money was paid, and the mortgagee remained there until quite late in the day for that purpose. The mortgagee having finally left, the money was tendered. The vendor then offered to send for the mortgagee, and obtain satisfaction as soon as he could get to his house and return, by twelve o'clock that night. The purchaser replied that he could not or would not wait. It was held that the purchaser had waived any further effort of the vendor to obtain a satisfaction piece, and was precluded from insisting that the vendor had failed to perform. *Karker v. Haverly*, 50 Barb., 79. An averment that the plaintiff executed a conveyance on a certain day, and transmitted it as soon as practicable after the execution of the contract, is bad. It should be, that he both executed and transmitted it, as soon as practicable. Or, if there are special circumstances equivalent in equity to strict performance at the stipulated time, such as acquiescence by the defendant, these should be set out, in order to give the defendant an opportunity to traverse or demur. *Bellas v. Hays*, 5 Serg. & Rawle, 427.

chasing; if there were none such, to the partners individually; or, finally, to a stranger. One of four partners offered his shares to the other three collectively, one of whom he knew would not buy. The other two stated their willingness to accept, but were told that no offer was made to them. It was held that the offer to the three inured to the benefit of the two, and that they were entitled to specific performance.¹ Z. entered into a contract with K. to sell him land, payment to be made in three instalments with interest, for which notes were to be given. It was agreed that, on payment of the first two notes, Z. was to give K. a deed with covenants against his own acts, and K. was to give back a mortgage on the property to secure the last note. The first note was paid; and before the second note fell due, Z. deeded the land to G., subject to the contract with K., with a covenant of warranty against the acts of the grantor. Afterward, K. sold to M. G. demanded from K. payment of the second note, and tendered him a deed from himself, with the covenants mentioned in Z.'s contract. K. said he could do nothing, and G. then formally demanded payment and execution of the mortgage. Subsequently, G. demanded payment of the two notes then due of M., the assignee of K., and tendered him the deed from Z., and also a deed from himself, and demanded payment of the second note, and a mortgage to secure payment of the third note. It was held that the tender of the deed from Z. to G., and which was offered by G. to M., was a sufficient assignment of Z.'s covenants when taken in connection with the tender of the deed from G. to M.; but that, to make the tender effectual, so as to give the vendee the right of possession, if the payor was unwilling to take the deed of M., the money should have been offered and a deed demanded of Z., with an offer to execute the mortgage.² Where the purchaser of land dies before a conveyance is completed, it is proper for the vendor to make

¹ *Homfray v. Fothergill*, L. R. 1, Eq. 567.

² *Gaven v. Hagan*, 15 Cal., 208.

out a deed to the heirs and devisees, and tender it to the executor, who represents the testator's means of paying for the land.¹

§ 440. *Offer of less than the contract calls for.*—The fact that the vendee, having made a computation of the purchase money due, tendered an amount slightly short of the correct amount, will not prevent his act from being a good offer of performance if the vendor made no objection to the amount, but wholly refused to fulfil on his part.² Although there has not been a strict legal compliance with the terms of the contract, yet if the non-compliance does not go to the essence of the contract, relief will be granted.³ Where a person contracts to sell the whole of certain land, when he in fact only owns an undivided half, to entitle the purchaser to enforcement of the contract to the extent of the vendor's interest, it is necessary for him to pay or tender one-half of the contract price.⁴

§ 441. *Payment into court.*—Although, where a strict, unconditional tender is required, it must be kept good by the actual payment of the money into court for the sole and exclusive use of the party to whom the tender was made,⁵ and tender and payment are an admission by the

¹ Brinkerhoff v. Olp, 35 Barb., 27.

² Clark v. Drake, 63 Mo., 354; Irvin v. Gregory, 13 Gray, 215; McDonald v. Kimbrell, 3 Iowa, 335. Where a person contracted to sell land at forty per cent. above its cost, with a credit of one year, it was held not to be usurious, and that, in a suit to compel specific performance, a tender of the original price with six per cent. interest was insufficient. Cassady v. Scallen, 15 Iowa, 93.

³ Smoot v. Rea, 19 Md., 398; Maughlin v. Perry, 35 Ib., 352; Mix v. Beach, 46 Ill., 311. A vendor agreed to convey land in consideration that the vendee would perform certain labor and pay a given sum of money. The work was done, but when the money was due the vendor was away. It was held that a tender of the money and interest to the vendor immediately on his return was sufficient to entitle the vendee to a decree for specific performance. Clark v. Sears, 3 Iowa, 104.

⁴ Marshall v. Caldwell, 41 Cal., 611.

⁵ Doyle v. Teas, 4 Scam., 202. There is a breach of a contract to convey, upon tender of the purchase money and refusal, and it need not be shown that the tender was kept good. Allen v. Atkinson, 21 Mich., 351; King v. Ruckman, 21 N. J. Eq., 599; McDonald v. Kimbrell, *supra*. As to what was deemed a sufficient tender of United States treasury notes, see Davis v. Parker, 14 Allen, 94; of money payable in instalments, Rogers v. Taylor, 40 Iowa, 193; Blackner v. Phillips, 67 N. C., 340. When the payment of money is a condition precedent,

party making the tender and paying the money, that the adverse party is entitled to it, and may take it out whenever he pleases ; yet when the tender is conditional, as in a suit for specific performance, or to have a deed absolute on its face decreed to be a mortgage, or the like, the payment of the money into court is not an admission that the money so paid belongs absolutely to the adverse party. But it is an admission that the money belongs to him when the condition upon which the tender was made has been complied with by such party, or the court has decreed a performance. A party cannot receive money conditionally paid into court while he denies the existence of the contract upon which it is paid.¹ Where the vendor puts the purchaser in possession, upon an understanding between them that the latter shall not pay the purchase money until he has a title, the purchaser cannot be called to pay the money into court ; the understanding becoming a matter of contract, by which the vendor must abide.² So, the vendee cannot be compelled to pay the purchase money into court before the completion of the title, when the vendor has voluntarily permitted him to take possession without any stipulation about paying the purchase money.³ And so, if the purchaser be in possession under a title anterior to the contract, or if possession were given independently of the

and a tender of performance is made, it entitles the vendee to performance on the part of the vendor, and the money need not be brought into court until the vendor demands it. *Washburn v. Dewey*, 17 Vt., 92. But where it was alleged that a tender of payment had repeatedly been made, and that the plaintiff had at all times been and still was ready and willing to pay, it was held that the tender should have been stated with greater particularity. *Duff v. Fisher*, 15 Cal., 375. And see *Hart v. McClellan*, 41 Ala., 251. Where the only allegation of tender was that the plaintiff "has been ready and willing during all the time aforesaid, and has offered to accept and take said conveyance, pursuant to said agreement, and to pay the balance of said purchase money," it was held insufficient. "To constitute a valid tender in such a case, the party must have the money at hand, immediately under his control, and must then and there not only be ready and willing, but produce and offer to pay it to the other party on the performance by him of the requisite conditions." *Englander v. Rogers*, 41 Cal., 420, per Crockett, J. See *Strong v. Blake*, 46 Barb., 227.

¹ *Lynch v. Jennings*, 43 Ind., 276 ; *Soule v. Holdridge*, 25 Ib., 119.

² *Gibson v. Clarke*, 1 Ves. & B., 500.

³ *Clarke v. Elliott*, 1 Mad., 606.

contract, and there is *laches* on the part of the vendor in completing his title, the court will not order the purchase money to be paid in.¹ But a non-resident purchaser of real estate who filed a bill for specific performance of the contract of sale, was required to pay the purchase money into court, though he was not in possession of the property.²

§ 442. *Right of party upon failure of the other to fulfil.*
—When time is not of the essence of the contract, if the purchaser without sufficient excuse fail to make payment, and the vendor is in no default, and is able and ready to perform all that the contract then requires of him, he may notify the vendee to pay within a reasonable time, or he, the vendor, will consider and treat the contract as rescinded.
.. In like manner, the vendee may notify the vendor, if the latter is in default.³ But to entitle either party to specific performance of a contract in which time is made essential, it must be shown that a performance, or a tender of performance, was made at the day stipulated.⁴ Where a day is specified in a contract for the payment of the purchase money and the delivery of the deed, and the time is allowed to pass without payment or a tender of the deed, the time for the performance of the parties becomes indefinite, but mutual and dependent.⁵ If the consideration of a contract is to be paid the 1st of August, it means on or before that day, and a tender made on the 31st of July is good.⁶ Where a contract of sale provided that in case the vendee failed to make his payments at the time agreed, “strictly and literally, without any default, the contract should become void, and all rights and interests thereby

¹ Freebody v. Parry, Cooper, 91 ; Fox v. Birch, 1 Mer., 105.

² Binns v. Mount, 28 N. J. Eq., 24.

³ Kirby v. Harrison, 2 Ohio St., 320 ; Remington v. Irwin, 14 Pa. St., 143 ; Hamill v. Thompson, 3 Colorado, 518 ; Hendrickson v. Hendrickson, 51 Iowa, 68. See *post*, Ch. XVI.

⁴ Wells v. Smith, 7 Paige Ch., 22.

⁵ Hatton v. Johnson, 83 Pa. St., 219.

⁶ Parker v. McAllister, 14 Ind., 12.

created cease and determine, and the property revert to, and revest in, the vendor, without any declaration of forfeiture or act of re-entry, or without any right on the part of the vendee of reclamation or compensation," and the notes given for the purchase money were not paid, it was held competent for the vendor to declare a forfeiture without offering to return the notes.¹

§ 443. *Offer to perform necessary to put the other party in default.*—When the purchaser is to pay, and the vendor upon payment to convey, performance, or an offer to perform, is a condition precedent to the right to insist upon performance by the other party.² So, where a contract of sale provides that a certain sum shall be paid on a day named, and the balance be secured by a bond and mortgage on the property, to be given upon the delivery of the deed, if the payment be made, a deed must be tendered to put the vendee in default, notwithstanding the time of payment was extended at the solicitation of the vendee with the understanding that the contract must be closed at the expiration of such extension.³ If the vendor has given a bond to make title upon the payment of the purchase money, and he cannot make a good title, the purchaser should tender the money and demand a title, or at any rate, in a suit to restrain the collection of the price, aver a readiness to fulfil on his part upon a sufficient title being made.⁴

§ 444. *Payment need not be made until deed delivered.*—Although, when a strict tender is required, it must be an unconditional offer of the full amount due, leaving it only at the will of the other to accept it, yet when one is to pay money, and the other to give a conveyance, no time fixed, and no provision that either shall be done first, the covenants being mutual and dependent, one is not bound to pay without receiving his conveyance, nor the other to part

¹ Phelps v. Ill. Centr. R.R. Co., 63 Ill., 468.

² Barron v. Frink, 30 Cal., 488; Hill v. Grigsby, 35 Ib., 656.

³ Leiard v. Smith, 44 N. Y., 618.

⁴ Smith v. Robinson, 11 Ala., 840.

with his land, without receiving his money.¹ In such case, it is not necessary, on the part of the purchaser, to make a strict tender and actually to deliver over the money unconditionally without his deed. It is sufficient that, upon reasonable notice to the owner, he is ready and willing to perform, and, when the performance is the payment of money, that he has the money, and is able and prepared to pay, and demands the deed, and the other refuses to receive the money and execute the deed.² The offer of the party making the demand to perform his part of the agreement, is implied, and a refusal of the other party to comply, dispenses with any other offer.³ Where the payees of notes agreed that should the maker, or his legal representatives, pay the notes as they respectively became due, then and in that case the payees or their successors would convey certain land to the maker, it was held that the maker was not bound to pay the last instalment at all events, and be left to the chance of afterward getting a deed or damages for its non-delivery; but that the promise to pay the last instalment on the appointed day, was dependent on the maker's receiving the deed at the same time.⁴ The undertakings of

¹ *Lester v. Jewett*, 11 N. Y., 453; *O'Kane v. Kiser*, 25 Ind., 168. A purchaser in possession under the contract cannot resist payment of the purchase money. *Lett v. Brown*, 56 Ala., 550; *Sivoly v. Scott*, *Ib.*, 555; *Wyatt v. Garlington*, *Ib.*, 576; *Strong v. Waddell*, *Ib.*, 471. But "the court will not order purchase money to be paid before a title is given, unless under special circumstances; such as taking possession contrary to the intention, or against the will of the vendor; or where the purchaser makes frivolous objections to the title, or throws unreasonable obstacles in the way of completing the purchase; or is exercising improper acts of ownership by which the property is lessened in value." The vice-chancellor in *Birdsall v. Waldron*, 2 Ed. Ch., 315. See *Van Campen v. Knight*, 63 Barb., 205. Of course the vendor cannot maintain a suit for specific performance until the last payment is due. *Jones v. Boyd*, 80 N. C., 258.

² *Kane v. Hood*, 13 Pick., 381; *Irwin v. Gregory*, 13 Gray, 215; *Lynch v. Jennings*, *supra*; *Hunter v. Bales*, 24 Ind., 299.

³ *Rawson v. Johnson*, 1 East., 208; *Tinney v. Ashley*, 15 Pick., 546. But see *Englander v. Rogers*, 41 Cal., 420.

⁴ *McCulloch v. Dawson*, 1 Ind., 413. And see *Leonard v. Bates*, 1 Blackf., 172; *Cunningham v. Gwinn*, 4 *Ib.*, 341. If the purchase money is payable in instalments, and the conveyance is to be executed on the last day of payment, the covenants to pay the instalments are independent covenants, and suit may be brought thereon, without conveying or offering to convey. But covenants to pay instalments which fall due on or after the day appointed for the conveyance, are dependent covenants, and the vendor, in his suit to recover the same,

the respective parties are always considered dependent, unless a contrary intention clearly appears. A different construction would, in many cases, lead to the greatest injustice, and a purchaser might have payment of the purchase money enforced against him and yet be unable to procure the property for which he paid it.¹

§ 445. *Demanding performance*.—According to some of the decisions, to maintain a suit for specific performance where it is necessary to show an offer of performance by the plaintiff, it is also necessary for him to prove that he demanded fulfilment on the part of the defendant; or allege some excuse for not having done so. An averment that the defendant is insolvent, is not a sufficient excuse for neglecting that requirement.² But other cases hold

whether he sues for those alone, or joins instalments that become due before the time, must show a conveyance, or offer to convey. *Hill v. Grigsby*, 35 Cal., 656. Where it is agreed that the land shall be paid for in three instalments, and, upon the payment thereof, the purchaser shall receive a conveyance, the covenants are dependent, and neither party can recover against the other, without averring a tender of performance on his part. A mere readiness to perform is not sufficient. If the vendor sues for the purchase money, he must aver a tender of such a deed as, by the terms of the contract, he was to give. If the action is brought by the vendee against the vendor for not conveying, he must aver a tender of the purchase money before suit brought. *Johnson v. Wygant*, 11 Wend., 48; *Green v. Reynolds*, 2 Johns, 207; *Jones v. Gardner*, 10 Ib., 266; *Gazley v. Price*, 16 Ib., 267; *Parker v. Parmele*, 20 Ib., 130. Where the money is to be paid to a third person, it indicates the intention and understanding of the parties that the payment is to be first made. In such case, the vendee is bound to produce evidence of payment in the first instance, and it is not sufficient to aver a general readiness on his part to perform. *Northrup v. Northrup*, 6 Cowen, 296; *Slocum v. Despard*, 8 Wend., 615.

¹ *Bank of Columbia v. Hagner*, 1 Pet., 455.

² *Hubbell v. Von Schoening*, 49 N. Y., 326; *Delavan v. Duncan*, Ib., 485; *Kimball v. Tooke*, 70 Ill., 553; *Crabtree v. Levings*, 53 Ib., 526; *Gale v. Archer*, 42 Barb., 320; *Walker v. Douglas*, 73 Ill., 445; *Sheets v. Andrews*, 2 Blackf., 274; *Brown v. Hart*, 7 Ib., 429; *Bowen v. Jackson*, 8 Ib., 203; *Mather v. Scoles*, 35 Ind., 1; *Wright v. Le Clair*, 4 Greene (Iowa), 420. See *Fairbanks v. Dow*, 6 N. H., 266. A demand for a conveyance "is best calculated to secure the specific execution of contracts, and to prevent a multiplicity of suits. Besides, it may be often a convenience to the purchaser, for a variety of reasons, not to receive the title as soon as he is entitled to it; and he may, therefore, prefer its continuance for some time in the vendor. If he can obtain the title to which he has a right whenever he may choose to demand it, he ought not to complain." *Sheets v. Andrews*, *supra*.

³ *Carter v. Thompson*, 41 Ala., 375; *Bell v. Thompson*, 34 Ib., 633. Where the vendor gives to the vendee a bond that he will, on a specified day, make, execute, and deliver, a deed, provided the vendee on that day pays certain promissory notes, it is necessary for the vendee, in an action on the bond, to prove that he demanded a deed. *Kinhead v. Shrene*, 17 Cal., 273.

that a demand is only material in relation to the question of costs.¹

§ 446. *When offer to fulfil dispensed with.*—A tender of performance need not be made when it would be wholly nugatory.² As where the vendor is unable to carry out the contract for the reason that the property is incumbered.³ The vendee of a house is not bound to pay the purchase money and take a conveyance when a tenant wrongfully holds over, and may, by protracted litigation, keep the vendee from obtaining possession for a long time.⁴ So, to maintain a suit to compel an administrator to convey, there need not have been a tender and demand if the administrator could not have conveyed without the direction of the court.⁵ And the executor of the assignee of the vendor, who has no act to perform in respect to the contract, need not tender a deed in order to claim performance of the other party.⁶ When the facts, alleged in the bill or given in evidence, show that an offer of performance by the plaintiff would not have been accepted, such offer is thereby rendered unnecessary.⁷ If the vendor denies the obli-

¹ Gray v. Dougherty, 25 Cal., 266; Jones v. City of Petaluma, 36 Ib., 230; Morris v. Hoyt, 11 Mich., 9. It has been held in New York, that, when a contract for the sale of land fixes no time for its performance, but imposes upon the vendor the duty to convey upon request, a request before suit for specific performance is not necessary. Bruce v. Tilson, 25 N. Y., 194. In such case, a demand before suit brought has no bearing upon the merits or rights of the parties. But by a demand and refusal, the party liable to perform is put in the wrong, and in the situation of unreasonably resisting the claim of his adversary, and is therefore chargeable with costs. Ibid.

² Kerr v. Purdy, 50 Barb., 24; Gill v. Newell, 13 Minn., 462. A. entered into a written contract with B. to convey to him certain land, provided B. would pay two promissory notes of A. when they became due. The notes were secured by a mortgage on the land. When B. paid the notes, he caused them to be transferred to him by indorsement. It was held that as the notes and mortgage in B.'s hands became immediately discharged, it was not incumbent on him to make a tender of them before demanding a deed. Lawson v. McKenzie, 44 Iowa, 663.

³ Harker v. Haverly, 50 Barb., 79; Morange v. Morris, 32 How. Pr., 178; Delavan v. Duncan, 49 N. Y., 485.

⁴ Howe v. Conley, 16 Gray, 552.

⁵ Collins v. Vanderver, 1 Iowa, 573.

⁶ M'Hoon v. Wilkerson, 47 Miss., 633.

⁷ Hunter v. Daniel, 4 Hare, 420; Seward v. Willock, 5 East., 202; Poole v. Hill, 6 M. & W., 835; Wilmot v. Wilkinson, 6 B. & C., 506. And see Lovelock v. Franklyn, 8 Q. B., 371; Doogood v. Rose, 9 C. B., 131. If a party cannot be compelled to perform, his offer to perform is not sufficient to entitle him to spe-

gation of the contract, resumes possession of the land, and receives the rents and profits, a tender by the vendee of the purchase money is not necessary to entitle him to a decree for specific performance.¹ Where a vendor places himself in such a position as to make it appear that if a tender of the purchase price were made its acceptance would be refused, the purchaser need not make a tender in order to maintain his bill. In such case, an offer to bring the money into court when the amount is liquidated and his decree granted, is sufficient.² If the vendor refuses to receive the purchase money when tendered, or prevents the vendee from performing his part of the agreement, thus in effect making a demand nugatory, neither law nor equity requires it of the vendee. Under such circumstances, specific performance will be decreed within a certain time, provided the vendee, before that time, shall have performed on his part.³ The mere neglect of the vendor to tender to the vendee a deed, where the vendee is not injured by the delay, is not sufficient to preclude him from maintaining a suit to compel the vendee to receive the title.⁴ Although if the vendee, prior to the time appointed for the payment of the purchase money and the delivery of the deed, notifies the vendor that he will not take the property, this will

cific performance as against the other party. In 1850, the defendant gave to the plaintiff a bond to convey to him land in consideration that the plaintiff should effect a partition of this and other land between the defendant and a joint owner. The partition was partially effected that year, but its completion was postponed on account of some difficulties arising as to the boundaries. In 1857 these difficulties were overcome, and the plaintiff offered to go on and complete the partition. It was held that, as the plaintiff could not be compelled to perform, and his offer to do so was not equivalent to a performance, a decree for specific performance must be denied. *Cooper v. Pena*, 21 Cal., 403.

¹ *Brock v. Hidy*, 13 Ohio St., 306. But generally the vendee must either tender or bring into court the amount due.

² *Deichman v. Deichman*, 49 Mo., 107; *Fall v. Hazelrigg*, 45 Ind., 576. See *Goodall v. West*, 5 Cal., 339; *Young v. Daniels*, 2 Iowa, 126. Where a vendee has offered to the vendor a sum within a trifle of the amount due under a written contract to convey land, and holds himself in readiness to pay whatever the court shall order, equity will decree specific performance without a previous tender of the full amount, or bringing it into court. *Irvin v. Gregory*, 13 Gray, 215.

³ *Gray v. Dougherty*, 25 Cal., 266; *Washburn v. Dewey*, 7 Vt., 92.

⁴ *Woodson v. Scott*, 1 Dana, 470.

dispense with the formal tender of a conveyance by the latter; yet if a vendor, who has received such notice, applies to a court of equity to treat the agreement as an executed contract, and to direct a sale of the property for the payment of the purchase money, his bill so far partakes of the character of a bill for specific performance as to make it essential for him to show that he was able and ready, at the appointed time, to do what by the agreement he had engaged to do; or that he was disposed, and, if the contract had not been renounced by the vendee, would have been able, on the day appointed, to perform on his part.¹

§ 447. *Tender in bill.*—In equitable actions, when an offer to perform is necessary to a recovery, it is sometimes, as in suits for specific performance, not requisite to allege or prove an offer to perform previous to commencing the suit, an offer in the complaint being sufficient. This distinction between legal and equitable actions grows out of the circumstance that in the latter the court can protect the rights of any party entitled to performance in the judgment.² It has been held in New York that where, in a contract for the sale of land, the purchase money is to be paid on a particular day, and neither party performs or offers to perform on that day, although neither can maintain an action at law on the contract, yet either may claim specific performance in equity, making the offer incumbent on him in the bill, and a failure to make an earlier tender will only affect the question of costs.³ So, it has been held

¹ McKleroy v. Tulane, 34 Ala., 78.

² Thomson v. Smith, 63 N. Y., 301; Hawk v. Greensweig, 2 Pa. St., 295; Winton v. Sherman, 20 Iowa, 295; Rutherford v. Haven, 11 Ib., 587; Wells v. Smith, 7 Paige Ch., 22. *Contra*, Klyce v. Broyles, 37 Miss., 524. When the purchaser is beyond the jurisdiction, a bill by the vendor for specific performance tendering a deed, is sufficient, and it need not be alleged that a deed was tendered before suit. Watson v. Sawyers, 54 Miss., 64.

³ Stevenson v. Maxwell, 2 N. Y., 408. But see Knickerbocker v. Harris, 1 Paige Ch., 209. It has been held in Wisconsin, that where a person commences a suit to compel specific performance, he should prepare and tender a deed, but that his neglect to do so will not defeat his right of action, but only his right to costs. Seely v. Howard, 13 Wis., 336. Where the owner of real estate entered into a contract under seal to sell the same and give a deed upon payment therefor, which payment was to be made in five equal annual instalments, it was

that an action to foreclose an equitable lien for the purchase money under a contract for the sale of land, may be maintained without the previous tender of a deed, but that there should be an offer in the complaint to execute a conveyance.¹ The omission in a bill for the specific performance of a contract for the sale of real estate, of an averment that the plaintiff is willing and ready to perform the agreement on his part, is a defect of form merely, and may be amended.² The plaintiff need not aver a tender if he allege that the defendant refused to fulfil the contract, and expressly waived a tender.³ If the vendor by his answer to the suit of the vendee submit to perform, he may, by cross bill, compel the vendee also to perform. But he cannot, after resisting performance, and after the property has depreciated in value, compel specific performance by the vendee.⁴

§ 448. *Preparation and tender of deed.*—In England, upon a sale in consideration of a gross sum, it is incumbent on the purchaser to prepare the conveyance, and tender it for execution to the vendor.⁵ In this country, the prevail-

held that, upon default of the purchaser to pay any of the instalments, an action for the purchase money could not be maintained by the vendor without proving that, before bringing the suit, he offered to execute a conveyance on receiving payment in full. *Beecher v. Conratt*, 13 N. Y., 108. *Crippen and Hand, Js., dissenting.*

¹ *Freeson v. Bissell*, 63 N. Y., 168. Where the plaintiff sets out in his petition that he "is willing to pay if he can get a good title," it is a sufficient tender to support the suit, when the land in controversy has been sold by the obligor, and he has died, and the rights of the plaintiff and the second vendee have not been judicially settled. *Johnson v. Hopkins*, 19 Iowa, 49. But the general offer of a complainant to do and perform whatever the court shall decree ought to be done by him, is not enough to maintain a bill in equity for specific performance when it appears that before bringing the suit he did not offer or intend to perform the contract, and that the bill is filed after there should have been performance, and when the condition of the parties has materially changed. *Ely v. McKay*, 12 Allen, 323. See *Christian v. Cabell*, 22 Gratt., 82.

² *Chess's Appeal*, 4 Pa. St., 52.

³ *Martin v. Merritt*, 57 Ind., 34.

⁴ *Tobey v. Foreman*, 79 Ill., 489.

⁵ *Dart's V. & P.*, 245. In *Baxter v. Lewis, Forrest*, 61, on a bill filed by a vendor of land against the purchaser for a specific performance, the defendant having been decreed to pay the purchase money, which he neglected to do, he was attached. A motion to set aside the attachment on the ground that as the vendor had not prepared and tendered a conveyance, the defendant was not bound to pay, was denied, the court holding that it was the duty of the defend-

ing practice is, that the vendor shall prepare the deed, and have it ready when called for. This would seem to be the obvious meaning of the parties when the seller covenants that he will convey the title to the purchaser; and such has been expressly held to be the rule in California, Iowa, Maine, Massachusetts, Minnesota, New Hampshire, Pennsylvania, Illinois, Mississippi, and South Carolina.¹ In Arkansas, it is the duty of the purchaser to prepare the conveyance at his own expense, and tender it to the vendor, according to the English rule.² It is the same in Alabama; and in the latter State it has been held that the vendor, when required, must furnish an abstract of his title.³ In New York, the doctrine maintained by the earlier cases that the vendee, after tendering the purchase money and demanding a deed, must, after waiting a reasonable time, apply for the deed, is no longer advocated, and it is now held that there need be but one demand in order to put the vendor in default. When the day is fixed for the delivery of the deed, and the purchase money has been paid, the duty is absolute on the vendor to deliver his deed at the time. He should therefore prepare the deed and be ready to deliver it when demanded. "One request (even if a request at all were necessary) would be enough to put the vendor in default."⁴ It has been held in Maine, that where

ant to prepare and tender the conveyance and pay the purchase money. In *Knight v. Crockford*, 1 Esp., 190, on an objection that the plaintiff, a purchaser, could not recover on the contract in question, because he had not proved the preparation and tender of a deed to the vendor, Eyre, C. J., admitted that the objection was according to the rule, but that as the vendor had deprived himself of the power to convey the property by selling it to another, a strict performance on the part of the plaintiff was unnecessary.

¹ *Morgan v. Stearns*, 40 Cal., 434; *Carson v. Lucore*, 1 *Greene* (Iowa), 33; *Powers v. Bridges*, 2 *Ib.*, 235; *Young v. Daniels*, 2 *Iowa*, 126; *Hill v. Hobart*, 16 *Me.*, 164; *Tinney v. Ashley*, 15 *Pick.*, 546; *St. Paul Division v. Brown*, 9 *Minn.*, 157; *Fairbanks v. Dow*, 6 *N. H.*, 266; *Sweitzer v. Hammel*, 3 *Serg. & Rawle*, 228; *Buckmaster v. Grundy*, 1 *Scam.*, 310; *Standifer v. Davis*, 13 *Sm. & Marsh*, 48; *Prothro v. Smith*, 6 *Rich. Eq.*, 324. See *Dana v. King*, 2 *Pick.*, 155; *Hunt v. Livermore*, 5 *Ib.*, 395; *Brown v. Bellows*, 4 *Ib.*, 179; *Green v. Reynolds*, 2 *Johns.*, 207; *Hudson v. Swift*, 20 *Ib.*, 27; *Parker v. Parmele*, *Ib.*, 130; *Northup v. Northup*, 6 *Cowen*, 296; *Slocum v. Despard*, 8 *Wend.*, 615; *Johnson v. Wygant*, 11 *Ib.*, 48.

² *Byers v. Aiken*, 5 *Pike*, 419.

³ *Chapman v. Lee*, 55 *Ala.*, 616.

⁴ *Carpenter v. Brown*, 6 *Barb.*, 147, per *Gridley, J.* Formerly, in New York, under a covenant to convey, the vendor was not bound to prepare the convey-

the purchaser pays for the land in full, and the vendor gives him a bond conditioned that the vendor shall, in a reasonable time after request, make and execute to the purchaser or his assigns a conveyance, a demand for the deed will be good without at the same time producing the bond.¹

§ 449. *Waiver of right.*—A party may waive a condition, or treat the contract after default as continuing in force, in which case he cannot insist on a forfeiture.² Although it is agreed that, in case of a failure to pay at the time set, the purchaser shall forfeit the contract, and surrender the land, yet if, after such default, the vendor claim payment and permit the purchaser to improve the land, the vendor will be deemed to have waived the forfeiture, and, if he refuses to convey, he will be compelled to pay for the improvements.³ In a suit for the specific performance of a contract for the sale of real estate, it appeared that the property having been bought by the plaintiff at auction, and ten per cent. paid by him thereon, he tendered the agent of the vendor a check for the balance, which was declined, because it was not certified; that the plaintiff then went away to get the check certified, and in an hour and a half came back, tendered it duly certified, and demanded a conveyance, which was refused on the ground that the plaintiff was not ready to perform at the time stipulated; and that the land was

ance until the party who was to receive it was in a situation rightfully to demand it. After such demand, the grantor was allowed a reasonable time to draw and execute the deed, and he was then to have it ready to deliver when it was called for, and he was not in default until a second demand was made. The purchaser might, however, prepare the deed and tender it for execution; and in that case, only one demand was necessary. *Fuller v. Hubbard*, 6 Cowen, 1; *Connelly v. Pierce*, 7 Wend., 129; *Wells v. Smith*, 2 Edw. Ch., 78.

¹ *Hill v. Hobart*, *supra*. In a suit for the specific performance of a contract to convey real estate, the only proof as to the delivery of the deed was the following testimony of the plaintiff: "I had in my possession papers and instruments signed by the defendants in this action, in reference to the conveyance by the defendants of said lot of land, described in the petition, to the plaintiff. I had papers in possession three different times, not under my control, but they were in my custody for a short time." Held insufficient. *Steel v. Fife*, 48 Iowa, 99. For proof of the delivery of a deed, see *Roberts v. Swearingen*, 8 Nebr., 363.

² *Ewins v. Gordon*, 49 N. H., 460; *Sharp v. Trimmer*, 24 N. J. Eq., 422; *Morgan v. Herrick*, 21 Ill., 481.

Bellamy v. Ragsdale, 14 B. Mon., 364.

then sold and conveyed to another person who knew what had transpired. It was held that, as the tender was rejected because the check was not certified, and not because it was not money or a legal tender, the right to demand money and performance at the precise time was waived, and that, as the second purchaser took his conveyance with notice of all the circumstances, he held his title subject to the equities of the plaintiff, and must convey the property to him.¹ Where the vendor acknowledged the receipt of money, the assignment of paper, and the note of the vendee, as payment, and agreed to execute a deed when demanded, the collection of the paper assigned not being made a condition precedent to the conveyance of the title, it was held that the contract would be specifically enforced.² If either party to a contract of sale fails or refuses to claim or act under the contract for such a length of time as gives the impression that he has waived or abandoned the sale or purchase, and more especially, when the circumstances justify the belief that his intention was to perform the contract only in case it suited his interest, he will forfeit all claim to equitable relief.³ Although there must be a good excuse, when there has been a failure to comply with the terms of a contract of sale, or a court of equity will not grant relief, yet if the purchaser has announced his determination to abandon the contract, and the vendor has acquiesced in such abandonment, and made an agreement to sell the land to a third person who is put into possession, the previous contract becomes a nullity.⁴ Where, under a contract for the sale of real estate, the purchaser is entitled to possession both as vendee and lessee, and, upon the expiration of the lease, he refuses to complete the purchase, the vendor, by

¹ *Duffy v. O'Donovan*, 46 N. Y., 223. See *Laverty v. Moore*, 33 Ib., 658; *Ditto v. Harding*, 73 Ill., 117; *Hedenberg v. Jones*, Ib., 149; *D'Wolf v. Pratt*, 42 Ill., 198; *Hoyt v. Tuxbury*, 70 Ill., 331; *Cunningham v. Brown*, 44 Wis., 72.

² *Smoot v. Rea*, 19 Md., 398.

³ *Eastman v. Plumer*, 46 N. H., 464.

⁴ *Wood v. Perry*, 1 Barb., 114.

accepting the rent, waives his right to specific performance of the contract of sale.¹

§ 450. *Disaffirmance of contract.*—Where a vendee positively refuses to receive a deed at the time and place agreed upon, it is not necessary for the vendor to execute and tender one.² The necessity of a tender to the vendee is superseded by a notice from him to the vendor, of the abandonment of the possession, and a refusal to take the property according to the contract.³ And the same is of course the case when the notice comes from the vendor to the vendee that the former will not fulfil.⁴ A party, under a contract for the purchase of real estate, took possession and paid part of the consideration, but defeated an action to recover the balance of the purchase money, on the ground that the contract was void by the statute of frauds. It was held that, as he had disaffirmed the contract, he was not en-

¹ *Bryan v. Read*, 1 Dev. & Batt. Eq., 78. If the obligor has performed the principal part of his contract, and the obligee performs the residue, but not because the obligor refused to perform such residue, the latter will not be deprived of the benefit of the contract. *Church v. Steele*, 1 A. K. Marsh, 325.

² *Maxwell v. Pettinger*, 3 N. J. Eq. (2 Green), 156. A party who intends to object to a proposed conveyance, must do so when it is presented, or after time taken to consider it, or to consult counsel. He cannot be permitted to retain the proposed deed without objection, or reservation of the right to object, and afterward, when sued for a breach, set up the objection for the first time in answer to the action. *Morgan v. Stearns*, 40 Cal. 434. An offer which by its terms limits the time of acceptance, is withdrawn by the expiration of the time without acceptance, and an acceptance afterward, will not bind the party making the offer. *Potts v. Whitehead*, 20 N. J. Eq., 55; *Kerr v. Purdy*, 51 N. Y., 629, reversing S. C., 50 Barb., 24. Plaintiff contracted to sell and convey to defendant certain lots in the city of New York, and to assign two certain leases of another lot executed by the city corporation on sale for unpaid taxes. At the time named for performance, plaintiff tendered a deed of the lots, and offered to assign the leases, but defendant refused to perform as to the leasehold interests, on the ground that plaintiff's leases were invalid. In a suit to have the contract vacated, in which the defendant asked for a specific performance of the contract, the special term decreed specific performance as to the lots, with an abatement from the contract price of the value of the leasehold interests. The general term, on appeal, modified the judgment by awarding specific performance of the entire contract in case defendant consented to take the assignment of the leases, which he did. It was held error; that the general term ought not, under the circumstances, to have adjudged a specific performance as to the leasehold interests without the consent of plaintiff. *Boyd v. Schlesinger*, 59 N. Y., 301.

³ *Crary v. Smith*, 2 N. Y., 60.

⁴ *White v. Dobson*, 17 Gratt., 262; *Brown v. Eaton*, 21 Minn., 409; *Mattocks v. Young*, 66 Me., 459.

titled to a decree for the specific performance of it.¹ Although, in general, a contract of sale will not be enforced if the vendor has been in default and the vendee will thereby sustain serious loss if compelled to perform, yet if the purchaser knew, when he entered into the contract, that the title was defective, and that it would require considerable time to remove the defect, or if he ascertains this after his purchase, and acquiesces in the delay, or proceeds, with knowledge of the defect, to carry out the contract, he cannot complain.²

¹ Payne v. Graves, 5 Leigh, 561.

² Pincke v. Curteis, 4 Bro. C. C., 329; Vail v. Nelson, 4 Rand, 478. Where a complaint to recover the purchase money due upon a written contract of sale, alleges possession by the defendant of the land sold, and a refusal to surrender it to the plaintiff, the plaintiff is entitled to recover, although a deed was not tendered when the purchase money became due, the defendant's acts being an acquiescence in such failure. Emmons v. Riger, 23 Ind., 483.

CHAPTER XV.

ACTS OF PLAINTIFF DISENTITLING HIM TO PERFORMANCE.

- 451. Where the contract, if enforced, would be capable of being immediately dissolved.
- 452. Effect in general of breaches of covenant.
- 453. Wrongful re-entry of vendor.
- 454. Trifling breaches disregarded.
- 455. Waiver.

§ 451. *Forfeiture of right under contract.*—Having considered, in the last chapter, the cases in which the plaintiff has deprived himself, by his default, of all claim to the intervention of a court of equity in his behalf, there remain to be considered his acts in contravention of the contract, constituting a bar to specific performance. If the contract of the parties is such that the plaintiff would be deprived of the benefit of it if it were enforced, it would be an idle ceremony for the court to enforce it.¹ The court has often refused to create a legal relation, on the ground that, if created, it would be immediately dissoluble. In a suit for the specific performance of an agreement for a lease, the bill was dismissed with costs, because there had been such neglect, on the part of the plaintiff, both as to insurance and repairs, as would, if the lease had been executed, have amounted to breaches of covenant on which there would have been a right to re-enter and avoid the lease.² Where

¹ Lewis v. Bond, 18 Beav., 87.

² Gregory v. Wilson, 9 Hare, 683. In this case the vice-chancellor said: "The contract is to create a legal relation between the parties, which, when created, is to be determinable by one party on the non-fulfilment by the other of certain obligations. Possession is taken under the contract. The party on whom the obligations are to rest, obtains on his part the full benefit of the contract. Is a court of equity to hold that, until the legal relation is created, the contract is unilateral, and that the party who has the benefit of the contract is not to be subject to the consequences which are stipulated to attach upon the non-performance of the obligations into which he has agreed to enter? It is true that until the legal relation is created, the stipulated remedy by re-entry cannot be made

a contract for the renewal of a lease provided that the demised premises should be used "strictly as a private dwelling, and not for any public or objectionable purpose," and the assignee permitted them to be occupied for a boarding-house, specific performance was refused, although the lessor had consented that the premises might be used for lodging in connection with a girls' school.¹ And although the acts of the plaintiff may not have been such as to have worked a forfeiture of his rights under the contract, yet he who seeks equity must do equity; and the principle heretofore considered, that one who asks the court to enforce an agreement in his favor, must show that he has performed, or been ready and willing to perform, his part of the contract, furnishes a defence when it is proved that he has been guilty of a breach.²

§ 452. *Right of lessor to insist on covenants in lease.*—A tenant who has committed waste, treated land in an unhusbandlike manner, or been guilty of breaches of covenant for which the lessor would have a right of re-entry, is not entitled to specific performance of a contract for a lease. The effect of omitting repairs, as we have seen, is the same; there being no difference in the consequences of a breach of such a covenant, and the breach of a covenant not to assign without a license, upon which it is well settled that if an ejectment is brought upon a right of re-entry reserved, the lessee will not be permitted to show that by the assignment the lessor has sustained no damage. It is sufficient that the lessor insists upon his covenant; and no one has a right to put him in a different situation.³ The landlord of premises, which he held under a lease, agreed in writing to under-let it at a yearly rent, with an option to the tenant to take an under-lease upon the same terms for twenty-one

available. But it is for this court to determine whether the legal relation shall be created or not; and surely, the court may well refuse to create it, if it be satisfied that there is such conduct as to justify the immediate dissolution of it if it were created."

¹ Gannett v. Albree, 103 Mass., 372.

² Walker v. Jeffreys, 1 Hare, 341.

³ Hill v. Barclay, 18 Ves., 56; *ante*, § 451.

years from a day named. The tenant retained possession under the agreement four years, when he received notice to quit. He then applied to his landlord for a lease for twenty-one years. Subsequently, the landlord obtained possession of the premises by a warrant. The tenant having brought a suit for specific performance and an injunction, the vice-chancellor, holding that the defendant must be taken to have entered into the agreement in expectation that the plaintiff would keep the property in repair, which it appeared he had not done, dismissed the bill with costs.¹ A lease for twenty-one years provided that the lessee should insure the premises, and keep them in repair, and that the landlord should, at the expiration of the term, if all the covenants had been kept, at the request of the lessee in writing, grant a new lease for a further period of twenty-one years, and so from time to time upon the expiration of every subsequent term of twenty-one years. The lessee built extensively on the premises, and, upon the termination of the first twenty-one years, a new lease was granted. Some time previous to the expiration of the second term of twenty-one years, the lessee gave written notice that he wanted a new lease. One of the buildings on the premises was then greatly out of repair, and the lessee permitted it to remain in that condition, because, from correspondence with the lessor, he considered it uncertain whether a new lease could be obtained, in consequence of an alleged for-

¹ *Nunn v. Truscott*, 3 De G. & Sm., 304. "With regard to the habit of the court continuing an injunction where a farm has been held and treated in a grossly unhusbandlike manner, and where there would have been a right of re-entry in the lease, if a lease had been executed, I have said, and I think that right, that I would not continue an injunction, with a view to a specific performance, which, if the agreement was specifically performed by executing a lease, would have been put an end to by the clause of re-entry that must have been introduced in that lease." Lord Eldon in *Gourlay v. Duke of Somerset*, 1 V. & B., 68. "I will not undertake to say, whether there have been such cases as are alluded to, much less that there never will be such a case, where, even if no right of entry was to be introduced under an agreement for the lease of a farm, yet the court, seeing a gross case of waste, which will in all cases be a forfeiture of the place wasted, considerable or not, and gross breaches of covenant that could not be indemnified by damages, would leave the tenant to law, and grant no relief here." *Ibid.*

feiture in neglecting, for a few days, to keep up the insurance. It was held that the lessor would not be restrained by injunction from recovering possession in ejectment, as the lessee had not made repairs within a reasonable time.¹ Specific performance was decreed of a contract for a building lease, where the intended lessee had erected on part of the land a brew house, and the lessor insisted that such erection would injure his adjoining property; the court not regarding it as necessarily a nuisance. But the question whether, if it had been a nuisance, it would have constituted a defence, was left open.² The owner of premises granted a lease for twenty-one years, with a proviso determining the lease and giving the lessor a right of re-entry on non-performance of any of the covenants in the lease, and the lessor covenanted that, at the end of the term, if it should not be sooner determined by the lessee's acts or defaults, he would grant him a lease for the further term of fourteen years. The rent was paid, and the lessee having remained in possession after the expiration of the term, filed a bill for specific performance of the covenant to renew and for an injunction to restrain an action of ejectment which had been brought against him by the lessor for breaches of covenant during the term of which the lessor at that time had no knowledge. The motion for an injunction was denied on the ground that the lessor ought not to be placed in a worse situation after the expiration of the term, than he would have been in had he known of the breach, and

¹ Job v. Banister, 39 Eng. L. & Eq., 599.

² Gorton v. Smart, 1 Sim. & Stu., 66. In this case, counsel for the defendant insisted that a brew house was not a building within the terms of the agreement; 2d. That the plaintiff, having rejected the offer of a lease on the condition of his adopting the means for preventing the brew house from being a nuisance and a damage to the defendant's property, was not entitled to a lease on any other terms; 3d. That it was proved that the brew house, as then used, was an injury to the property of the defendant. The vice-chancellor, in decreeing specific performance, remarked that there was no covenant in the agreement to restrain the building of a brew house, that a brew house was not necessarily a nuisance, and that if it was so used as to become a nuisance, the law was open to the defendant. See Williams v. Cheney, 3 Ves., 59; Wingfield v. Crenshaw, 4 Hen. & Munf., 474.

availed himself of it before the term expired.¹ Where there was a conflict of evidence as to whether there had been a breach of the covenants which under the agreement were to be contained in the lease, specific performance was decreed on the ground of part performance; but the court enabled the plaintiff to try the question of breach of covenant, by directing that the lease should be dated previous to the alleged breach, and requiring him to admit, in an action, that the lease was executed on the day of its date.²

§ 453. *Open and wrongful violation of contract.* — A grantor, who has made an unlawful and fraudulent re-entry, will not be entitled to specific performance.³ Property was sold upon the condition that the vendee should be put into immediate possession. Disputes having afterward arisen concerning the title, the vendors tendered the purchaser his deposit, demanded a return of the possession, drove the purchaser's stock off of the land, and notified the tenants not to pay their rent to him. It was held that this conduct operated as a rescission of the contract, and consequently was a bar to a suit by the vendors for specific performance.⁴

¹ Thompson v. Guyon, 5 Sim., 65. See Trant v. Dwyer, 2 Bligh N. S., 11.

² Price v. Coombs, 1 De G. & J., 34. ³ Marble Co. v. Ripley, 10 Wall, 339.

⁴ Knatchbull v. Grueber, 1 Mad., 153; S. C., 3 Mer., 124. In this case, Lord Eldon said: "Now the plaintiffs had a right to insist on the performance of the contract, what right could they have to turn the defendant out of possession which was taken under that very contract? The defendant had a right to retain possession under the contract till a conveyance should be executed, provided the difficulty about the title could be set right, which was still a point in question. But the plaintiffs, by this act, destroy the contract, and how can they now pretend to have reserved a right to its performance when, by their own act, it has been rendered incapable of being performed? Now, if the case rested here, the question would be simply this: whether the vendors can insist that the purchaser shall specifically execute the contract, when, if he were to specifically execute the contract, it is rendered impossible for him to have the full benefit intended him by the contract, and that, through the act of the vendors themselves. Their difficulty in this part of the case is this: It was incumbent on them, if they meant to have the contract carried into execution upon the principle of compensation adopted in this court in the case of a defective title as to an immaterial part of the purchase, to have left the property in the enjoyment of the purchaser, so that he should not be deprived of any part of the benefit intended him by that contract. And I cannot see how it would be possible for the vendors, if nothing more had passed subsequently, to say the title shall be good as far as we choose, and bad as far as we choose; you shall not have the

§ 454. *When breach of covenant excused.*—Although a contracting party may have committed small breaches, yet when the other party might have remedied them, and if specific performance were refused the plaintiff would be without any adequate redress, the court will grant the relief without costs to the plaintiff.¹ So, if the non-performance of the plaintiff was owing to unexpected events beyond his control, it may not constitute a defence. Thus, where a lease of mines contained a covenant for renewal, and the lessee covenanted to work the mines, and in a suit by the lessee for specific performance of the covenant to renew, it appeared that the lessee had not worked the mines in consequence of their having been flooded, the court, though it did not decide the point, was inclined to think that this would be no bar to relief.² Although breaches of covenant which are merely nominal will not bar specific performance,³ yet the breach must be so trivial as that the court would relieve against a forfeiture at law; the fact that the matter rests in contract, not inducing equity to relieve more readily than it would after the legal relation had been actually created.⁴

§ 455. *Waiver of right to object.*—A mere waiver in law of the breach of a contract for a lease, may not deprive the lessor of the right to avail himself of the breach as a defence to a suit by the lessee for specific performance. For the breach may personally disqualify the lessee, and lead the court to consider whether the lessor ought to be put in the power of such a tenant.⁵ Where the acts of the plaintiff are relied on as a forfeiture, it must be shown to the satisfaction of the court that there has been a forfeiture

benefit of the original contract, but you shall be bound to take the estate with a compensation for so much of it to which we are unable to make a title; and to say this, after they have, by their own act, placed him in a situation different from that in which he was entitled to stand, by the terms of that very contract."

¹ Holmes v. Eastern Counties R.R. Co., 3 Jur. N. S., 737.

² Walker v. Jeffreys, 1 Hare, 341. ³ Ibid.; Pain v. Coombs, 3 Sm. & Gif., 449.

⁴ Gregory v. Wilson, 9 Hare, 683.

⁵ Boardman v. Mostyn, 6 Ves., 467.

on which an ejectment could be maintained, before it will refuse its aid ;¹ and if a landlord has found no fault with his tenant, but has suffered him to act on the faith of the contract, he will not be permitted, excepting for very strong reasons, to raise such objections for the first time when the tenant seeks to enforce the contract.²

¹ Gregory v. Wilson, *supra*.

² Mundy v. Joliffe, 5 My. & Cr., 167, reversing 9 Sim., 413; S. C., 9 L. J. N. S., 95. In this case, Lord Cottenham said: "The defendant has endeavored to set up, as a defence, acts of the tenant which would have been breaches of the covenant if a lease had been executed. In this I think he has wholly failed. For instance, he charges the tenant with having grubbed up a hedge, and it is proved to have been done with the approbation of his own steward. This ground of defence assumes the existence of the agreement; and if, upon that supposition, the landlord never complained of the conduct of the tenant, but permitted him to act upon the faith of the contract, it would require a strong case to enable the landlord to raise such objections for the first time when the tenant claimed the benefit of it." A decree for specific performance was refused in the court below, on the ground that the agreement proved varied from that alleged in the bill.

CHAPTER XVI.

LAPSE OF TIME.

- 456. How in general regarded.
- 457. Division of subject.
- 458. Whether or not time is essential, how determined.
- 459. Importance of time of performance how proved.
- 460. Presumption as to time.
- 461. Effect of stipulation as to time.
- 462. Evidence as to intention.
- 463. Agreement for possession how construed.
- 464. Date from which time begins to run.
- 465. Designation by party of time within which there must be performance.
- 466. Where stipulation is in the nature of a penalty.
- 467. Non-payment of money at time agreed.
- 468. Possession and improvements under contract how regarded.
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- 474. Laches of vendor.
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- 479. Indulgence by vendor.
- 480. Recognition of contract.
- 481. Extension of time for performance.
- 482. Conduct of party waiving delay.
- 483. Silence of party constituting a waiver.

§ 456. *Importance attached to it.*—It may constitute a defence that the plaintiff has forfeited his rights under the contract by the non-performance of it at the time agreed, or by permitting a long interval to elapse after the agreement was made before bringing his suit.¹ Default by the

¹ It is well settled that the delay of either party in performing his part of the agreement, or in commencing or prosecuting his suit, may deprive him of the aid of the court in enforcing the contract. *Mackreth v. Marlar*, 1 Cox, 259, tried before Lord Kenyon, was one of the earliest cases on this point. Where the vendor did not deliver an abstract previous to the time fixed for completion, nor until after an action for the deposit, and the purchaser had demanded a return of his deposit at the date for completion, it was held that there was proof of an abandonment of the contract by the vendor. *Lloyd v. Collett*, 4 Bro. C. C., 469, n. *S. P.*, *Harrington v. Wheeler*, 4 Ves., 686. Approved in *Fordyce v.*

party seeking specific performance, in one or other of these respects, is common, and has given rise to much discussion and to numerous decisions. Courts of equity formerly paid but little attention to the mere time at which the stipulations of a contract were to be performed and carried the doctrine of relief, notwithstanding a want of punctuality, to an extravagant length.¹ It has been said that "equity went beyond the true limits to which every jurisdiction should be confined, as it amounted to a substitution, *pro tanto*, of what the parties had not contracted for. But the tendency of the modern decisions is to bring the doctrine within such moderate bounds as seem clearly indicated by the principles of equity, and by a reasonable regard to the common accidents, mistakes, infirmities, and inequalities belonging to all human transactions."² At law it is incumbent on the plaintiff to show performance on his part within a reasonable time, or, if the time be fixed, within such time.³ But equity, distinguishing between terms of the contract which are matters of form, and a breach of which it would be inequitable in either party to insist on as a bar, and such as are of the substance of the agreement and applying to contracts the principles which

Ford, 4 Bro. C. C., 494, by Lord Alvanley, and in *Lechmere v. Brazier*, 2 J. & W., 287, by Lord Eldon. And see *Coster v. Turner*, 1 R. & M., 311; *Cubitt v. Blake*, 19 Beav., 454. "A party cannot call upon a court of equity for specific performance, unless he has shown himself ready, desirous, prompt, and eager." Lord Alvanley in *Milward v. Earl of Thanet*, 5 Ves., 720, *n.* "Specific performance is relief which this court will not give, unless in cases where the parties seeking it come as promptly as the nature of the case will permit." Lord Cranworth in *Eads v. Williams*, 4 De G. M. & G., 691.

¹ *Gibson v. Patterson*, 1 Atk., 12. See *Lloyd v. Collett*, *supra*, *n.* In *Gregon v. Riddle*, cited 7 Ves., 268, Lord Thurlow is reported to have said that no language of the agreement could make time of the original essence of the contract. *Contra*, per Lord Kenyon, in *Seton v. Slade*, 7 Ves., 270. But now, an express agreement that time shall be of the essence is as valid and binding in equity as at law. *Hudson v. Bartram*, 3 Mad., 440; *Lloyd v. Rippingdale*, cited in 1 Y. & C. Ex., 410. And see *Honeyman v. Marryatt*, 21 Beav., 14, 24; *Baynham v. Guy's Hospital*, 3 Ves., 295.

² 2 Story's Eq. Juris., Sec. 780; *Drewe v. Hanson*, 6 Ves., 678; *Halsey v. Grant*, 13 Ib., 76; *Bowyer v. Bright*, 13 Price, 702; *Linton v. Potts*, 5 Blackf., 396; *Barnard v. Lee*, 9/ Mass., 92.

³ *Berry v. Young*, 2 Esp., 640, *n.*; *Wilde v. Fort*, 4 Taunt., 334; *Stowell v. Robinson*, 3 Bing., N. C., 928; *Alexander v. Godwin*, 1 Ib., 671; *McCulloch v. Dawson*, 1 Carter, Ind., 413; *O'Kane v. Kiser*, 25 Ind., 168.

have governed its interference in relation to mortgages, holds time to be, *prima facie*, non-essential.¹ Accordingly it may, and cases frequently occur in which it will, enforce a contract after the time for its performance has been permitted to elapse by the party asking for the interposition of the court.² The time within which suits may be commenced for the specific performance of contracts has not been extended by implication by the statutes prescribing a time within which an action at law must be brought.³ The question still remains, and must be decided in each suit, although brought within the statutory limit as to time, whether, under the peculiar circumstances, equity and good conscience require that the contract shall be specifically performed, or whether the party should be left to his remedy at law.⁴ It has been held that in cases of concurrent jurisdiction equity will not assist where the remedy at law has been barred by the statute.⁵ Of course, unless some time has been designated, the bill cannot be maintained. As it is a well-settled principle that a court of equity will not enforce a contract of which a material part remains to be settled by negotiation between the parties, where a party offered in writing to convey land, within a time named, for a certain sum, of which part was to be paid at the execution of the conveyance, and a mortgage given with interest at six per cent. to secure the balance, and no time was specified when the mortgage was to be paid, it was held that specific performance could not have been decreed if the offer had been accepted.⁶

¹ Seton v. Slade, 7 Ves., 273; Parkin v. Thorold, 16 Beav., 59; S. C., 2 Sim. N. S., 1.

² See Radcliffe v. Warrington, 12 Ves., 326; Pincke v. Curteis, 4 Bro. C. C., 329.

³ Hall v. Russell, 3 Sawyer, 506.

⁴ Peters v. Delaplaine, 49 N. Y., 362.

⁵ Blanchard v. Williamson, 70 Ill., 647. The provisions of the New York code "requiring a written acknowledgment to take a case out of the statute of limitations, has effectually destroyed the old doctrine on which courts of equity relieved vendees from forfeitures incurred in consequence of their failure to perform executory contracts for the sale of lands. That doctrine rested on the principle that time was not of the essence of the contract. But now the statute has interposed an absolute bar after the lapse of ten years." Gilbert, J., in McCotter v. Lawrence, 4 Hun., 107; 6 Thomp. & Cook, 392.

⁶ Potts v. Whitehead, 20 N. J. Eq., 55.

§ 457. *Heads of subject.*—In treating the subject under consideration, it will be convenient to regard it from the following points of view, which will occupy the remainder of this chapter. 1st. Where time is of the essence of the contract; 2d. Where time is not of the essence of the contract; 3d. How delay in fulfilling the contract is in general regarded; 4th. Laches or delay tending to show that the contract was abandoned; 5th. Waiver.

§ 458. *Materiality of time how determined.*—The phrase, “of the essence,” does not have reference to the rise in the value of land, or to the fact that the value is subject to fluctuations, but depends upon the intention of the parties. An agreement to give a deed on the payment of the first instalment, and that a mortgage shall be returned, is a strong circumstance to show that time was not considered of the essence, since a foreclosure and sale must be productive of delay, and there is to be added to this, the time given by statute in which to redeem after sale. And the death and intestacy of the ancestor, and infancy of the heir at law, will go far to excuse a strict performance of the contract.¹ On the other hand, if a person should give his note to another, payable in one year, bearing interest much below the current rate, in consideration of a covenant from the other, to convey to the maker certain land on the payment of the note, the low rate of interest would raise the presumption that the note was to be paid at maturity.² Although if a

¹ Morgan v. Herrick, 21 Ill., 481. In contracts for the sale of real estate, time is not usually of the essence of the contract, the intention being that the purchase shall be completed within a time reasonable under the circumstances of the case. Chadwell v. Winston, 3 Tenn. Ch., 110; Abbott v. L’Hommedieu, 10 W. Va., 677; Rader v. Neal, 13 Ib., 374.

² Brown v. Covilland, 6 Cal., 566. If, in a suit for the specific performance of the contract of sale, it appears that the instalments have become due according to the agreement, the court has no authority to extend the time of payment; the contract not being capable of enforcement otherwise than as the parties themselves have made it. Lombard v. Chicago Sinai Congregation, 75 Ill., 271. Equity will not decree specific performance of a contract where time is essential and the time specified has elapsed, unless the party seeking relief can show that he was diligent in trying to perform his part; nor unless the other party can be put in as good a situation as if the agreement had been complied with at the time specified. Rector v. Price, 1 Mo., 373.

creditor has his debt secured by bond and mortgage, or if a vendor retains the legal title to secure the purchase money, it is considered in equity that time is immaterial, and the parties are supposed to be willing to let the debt stand upon the security, unless judgment is taken on the bond, the mortgage is foreclosed, or a specific performance is required;¹ yet the principle does not apply to a case where A. being about to purchase land, agrees to let B. have one-third of it provided he will aid in raising the funds to pay the purchase money. In such a case, if the time in which the aid is to be rendered be expressly agreed on, and the party neglects to advance his portion of the purchase money, and thereby puts the burthen of raising all the funds upon the other, he cannot in conscience insist upon a right to stand off until the struggle is over, and, at any time when he sees fit, come forward and claim a share. Time, in such cases, is of the essence of the contract, and assistance in raising the purchase money is presumed to have been a principal inducement for allowing a participation in the bargain.²

§ 459. *Proof of intention.*—Equity treats time as originally of the essence of the contract when the agreement shows that the parties intended that it should be so regarded, and that it was not inserted as a merely formal part of the contract.³ It may be proved by parol, that, at the making of the contract, time was considered as of the essence.⁴ In this country, the more frequent fluctuations in the value of land, and in the business circumstances of men, than in England, are important considerations in each case, especially when the vendor sues to compel the specific performance of a contract for the purchase of land to which he is unable to give a good title at the time of bringing his

¹ Where a vendee took possession of land under a contract conditioned that the vendor should convey on a certain day, and that, at the same time, the vendee should secure the purchase money, but no conveyance was executed, and the purchase money was not paid for fifteen years, it was held that the lapse of time was no objection to a suit for specific performance at the suit of the vendee. *Waters v. Travis*, 9 Johns, 450.

² *Willis v. Forney*, Busbee Eq., 256. ³ *Hipwell v. Knight*, 1 Y. & C. Ex., 401.

⁴ *King v. Ruckman*, 20 N. J. Eq., 316.

suit.¹ The intention of the parties that time shall be deemed essential, if not expressed, may be implied from the nature of the agreement as to any one of the terms of the contract. But when this is claimed, it must be done without delay.² A party in default is not entitled to specific performance though time was not made essential when the contract was entered into, if the parties by their conduct afterward made it so.³

§ 460. *When time presumed material.*—It may be implied, from the general nature of the subject matter of the contract, that time is essential. Although in the ordinary case of the purchase of land and fixing a particular day for the completion of the title, the court considers that the principal object being only the sale of the land for a given sum, the particular day named is merely formal, and the stipulation means that the purchase shall be completed within a reasonable time, regard being had to all the circumstances of the case and the nature of the title to be made, yet if the property sold is of greater or less value by the efflux of time, it is manifest that time is of the essence of the contract, and the stipulations as to time must then be literally complied with in equity as well as at law.⁴ As examples, may be mentioned the cases of the sale of a reversion, or of a house for residence, or where the sale is to be followed by a change of residence of the vendor or purchaser at a given day.⁵ Where a party contracted for the purchase of a leasehold house for his residence, and it was

¹ Hepburn v. Auld, 5 Cranch, 262; Richmond v. Gray, 3 Allen, 25; Barnard v. Lee, 97 Mass., 92.

² *Monro v. Taylor*, 8 Hare, 51, 62.

³ *Jackson v. Ligon*, 3 Leigh, 161.

⁴ *Rogers v. Saunders*, 16 Me., 92; *Hull v. Noble*, 40 Ib., 459; *Prentice v. Betteley*, 2 Lowell, 289.

⁵ *Hipwell v. Knight*, *supra*; *Newman v. Rogers*, 4 Bro. C. C., 391; *Merritt v. Brown*, 19 N. J. Eq., 286; *Gale v. Archer*, 42 Barb., 320; *Edwards v. Atkinson*, 14 Texas, 373. Time is essential whenever, from change of circumstances, a performance, which would alone answer the ends of justice between the parties, has become impossible. *Pratt v. Low*, 9 Cranch, 466; *Longworth v. Taylor*, 1 McLean, 395; *Garnett v. Macon*, 6 Call, 308; or where the other party may be seriously injured or exposed to injury by non-performance within the time. *Doar v. Gibbs*, *Bailey Eq.*, 371.

agreed that he should have possession by a certain day, and the vendor, although he tendered possession, failed to show a good title by the day named, it was held, reversing the decision of the vice-chancellor, that the agreement as to time was of the essence of the contract, and a bill for specific performance was dismissed.¹ So, when the property is sold for immediate use which does not admit of delay, although the purpose for which it is desired is not mentioned in the contract, if the vendor

¹ *Tilley v. Thomas*, L. R. 3, Ch. 61, 69. In this case Lord Cairns, L. J., said: "Of the three grounds of interference mentioned by Lord Justice Turner, express stipulations require no comment. The nature of the property is illustrated by the case of reversions, mines, or trades. The surrounding circumstances must depend on the facts of each particular case. In this case the property sold was a residential leasehold house, not apparently let or producing rent at the time of sale, and intended by the defendant to be used as his own residence. Looking at the admitted facts thus stated, I can have no hesitation in saying that, in my opinion, it was essential that the defendant should have, by the time stipulated, possession of the house for repairs and improvements with a view to his own immediate residence; a possession, therefore, which could not be disturbed; a possession, that is to say, with a title, and that, to enforce against the purchaser performance after a breach of it by the vendor in this respect, would be inequitable." Sir John Rolt, L. J., said: "The first question in this case is, What is the true legal construction of the words in the contract, 'Possession to be given on the 14th of January next'? Do they mean possession *simpliciter*, with or without a title, or are they to be construed as meaning possession with complete title previously shown? I am of opinion, excluding everything that passed verbally between the parties or their agents at the time of the contract, that the possession referred to must be construed, even at law, to mean possession with a complete title previously shown. As a general rule, I think the word possession, in such a contract, should be so construed. A conveyance previously executed is probably not necessary. But it is not material to inquire into this; for here it is admitted that a good title was not previously shown. There may be cases in which, from the nature of the property, or from the context, the word may admit of a different meaning; and that appears to have been Lord Eldon's ultimate decision of the meaning of the expression as used in the agreement in *Boehm v. Wood*, 1 Jac. & W., 419. But general possession without a title would, or might be, the source of great embarrassment to a purchaser, and could scarcely have been in contemplation at the time of the contract; and it ought not, therefore, to be generally accepted as the true meaning of the expression standing alone. . . . Now, as a matter of construction merely, I apprehend the words must have the same meaning in equity as at law. The rights and remedies consequent on that construction may be different in the two jurisdictions; but the grammatical meaning of the expression is the same in each. And if this be so, time is a part of the contract; and if there is a failure to perform within the time, the contract is broken in equity no less than at law. But in equity there may be circumstances which will induce the court to give relief against the breach, and, sometimes, even though occasioned by the neglect of the suitor asking relief. Not so at law. The legal consequences of the breach must there be allowed strictly to follow. The defendant is entitled to say that the contract is at an end; and it is in this sense, I apprehend, that in such cases it is said that time is of the essence of the contract at law, though not necessarily so in equity."

knew the purpose.¹ So of the sale and purchase of stock which is subject to fluctuation in market value;² and of contracts for annuities on lives.³ Time may be essential, where the object of the contract is a commercial venture, whether land be purchased for such purposes, or other property.⁴ It was held to be so, where the land was bought for the erection of mills.⁵ Where the contract concerned the supply of coal which fluctuated in market price from day to day, and eleven months were allowed to pass before bringing the suit, the court, on account of the delay, refused to interfere.⁶ In a contract for the sale of a public house, the materiality of time was presumed from the conditions, as well as from the subject matter.⁷ Mines being liable to accidents, and to sudden and unforeseen losses, it has been held, in several cases, that time is of the essence of the contract for the sale of such property.⁸ Although it was stipulated in a contract that the plaintiff should purchase a field adjoining his own, procure the assignment of a term, and do other things requiring time, yet as the subject of the agreement was a colliery, it was held that time was so far of the essence of the contract, as to make it the duty of the vendor to exercise diligence, and that the purchaser had a right to decline to complete, if the vendor failed to do so.⁹ In a contract for the payment of money to obtain patents, it was held that time, from the nature of the object in view, was essential.¹⁰ In short, whatever may be the nature of the subject matter,

¹ *Wright v. Howard*, 1 Sim. & Stu., 190; *Nokes v. Lord Kilmorey*, 1 De G. & Sm., 444.

² *Coslake v. Till*, 1 Russ., 376; *Doloret v. Rothschild*, 1 Sim. & Stu., 590; and see *Lewis v. Lord Lechmere*, 10 Mod., 503; *Campbell v. London & Brighton R.R. Co.*, 5 Hare, 519.

³ *Withy v. Cottle, T. & R.*, 78.

Walker v. Jeffreys, 1 Hare, 341.

⁴ *Wright v. Howard*, 1 Sim. & Stu., 190. ⁵ *Pollard v. Clayton*, 1 K. & J., 462.

⁷ *Seaton v. Mapp*, 2 Coll. C. C., 556.

⁸ *Prendergast v. Turton*, 1 Y. & C. C. C., 110; *Clegg v. Edmondson*, 26 L. J. Ch., 681; *Parker v. Frith*, 1 Sim. & Stu., 199, *n.*; *City of London v. Mitford*, 14 Ves., 58; *Eads v. Williams*, 4 De G. M. & G., 674.

⁹ *Macbryde v. Weekes*, 22 Beav., 533. ¹⁰ *Payne v. Bänner*, 15 L. J. Ch., 227.

the time for the performance of the contract will be regarded, when time appears to be a distinct feature of the transaction.¹ If the property is going to waste, equity makes the time of the essence of the contract.² And so, when a person has an option to purchase, to be exercised at a certain time.³ The circumstance that delay would cause a party serious liability or loss, will incline the court to regard time as of the essence of the contract. Where a tenant contracted for the sale of the good-will and business, and it was stipulated that the contract should be closed by a certain day, time was considered essential for the reason that if the contract were not completed on the day named, the vendor might make himself liable as tenant for the ensuing year.⁴ And where the association which was to participate in the purchase money was liable to change, non-payment at the time agreed was held fatal to the contract.⁵ Where between the time fixed for the delivery of the conveyance, and the subsequent tender of the deed, after the title had been perfected, circumstances had materially altered, it was held that the vendee, who had acted in good faith, would not be compelled to accept a deed against his will, when he was willing to accept it at the time fixed for performance.⁶ Although a court of equity is more inclined to uphold than to forfeit contracts if there has been no culpable negligence, and it can do full justice between the parties, yet when there is a want of mutuality in the obligations arising from the transaction, time is essential in equity as well as at law.⁷ Where a person seeks specific performance of a parol contract for the purchase of land, he must present his claim without delay, and while performance can be enforced without injury to

¹ Garretson v. Vanloon, 3 Iowa, 128; Davis v. Stevens, *ib.*, 158; Scott v. Fields, 7 Ohio, Pt. 2, 90.

² Macbryde v. Weekes, *supra*; Hudson v. Temple, 29 Beav., 536.

³ Lord Ranelagh v. Melton, 2 Dr. & Sm., 278.

⁴ Coslake v. Till, *supra*.

⁵ Carter v. Dean of Ely, 7 Sim., 211.

⁶ Young v. Rathbone, 16 N. J. Eq., 224.

⁷ Maughlin v. Perry, 35 Md., 352; Magoffin v. Holt, 1 Duvall, 95.

the other party, and must show that he has done nothing inconsistent with his claim for performance.¹

§ 461. *Time made essential by stipulation.*—The parties themselves may stipulate that time shall be of the essence of the contract.² This has been done in almost all of the modern cases in which time has been strictly regarded. Such a provision will be enforced except under very peculiar circumstances.³ It has been said that “a court of equity has no more right to disregard an express stipulation that time shall be of the essence of the contract, than it has to give a year, or ten years, or ninety-nine years, for the payment of the whole or of one-half of the purchase money stipulated for in cash, if it should appear that it is difficult or impossible for the purchaser to pay at the time agreed upon.”⁴ But time cannot be made essential in a contract merely by so declaring, if it would be unconscion-

¹ Goodwin v. Lyon, 4 Porter Ala., 297; Porter v. Dougherty, 25 Pa. St. 405.

² Kemp v. Humphreys, 13 Ill., 573; Prince v. Griffin, 27 Ib., 514; Earl v. Halsey, 1 McCarter, N. J. Ch., 332; Grigg v. Landis, 21 N. J. Eq., 494; Fessler's Appeal, 75 Pa. St., 483. A contract for the sale of real estate provided that “in case the second party shall fail to make the payments aforesaid, and each of them, punctually and upon the strict terms and times above limited, and likewise to perform and complete all of his agreements and stipulations aforesaid, strictly and literally without any failure or default, then this contract, so far as it may bind said first party, shall become utterly null and void, and all rights and interests hereby created, or then existing, in favor of said second party, or derived from him, shall utterly cease and determine, and the premises hereby contracted shall revert to and revest in said first party without any declaration or forfeiture or act of re-entry, or without other act by said first party to be performed, and without any right of said second party of reclamation or compensation for money paid or services performed, as absolutely, fully, and perfectly, as if the contract had never been made.” The notes given for the purchase money not having been paid when due, the vendor declared a forfeiture without giving up the notes to the purchaser. It was held that the latter was not entitled to specific performance, an offer on the part of the vendor to return the notes not being necessary; and that the fact that the vendor had previously accepted payments past due, did not operate as a waiver of his right to declare a forfeiture. Phelps v. Ill. Cent. R.R. Co., 63 Ill., 468.

³ Stow v. Russell, 36 Ill., 18; Benedict v. Lynch, 1 Johns Ch., 370; Potter v. Tuttle, 22 Conn., 512; Baldwin v. Vanvorst, 10 N. J. Eq., 577. In Hipwell v. Knight, 1 Y. & C., 415, Baron Alderson said: “I do not see therefore why, if the parties choose, even arbitrarily, to stipulate, provided both of them intend to do so, for a particular thing to be done at a particular time, such a stipulation is not to be carried literally into effect in a court of equity. That is the real contract. The parties had a right to make it. Why then should a court of equity interfere to make a new contract which the parties have not made?”

⁴ Bullock v. Adams, 20 N. J. Eq., per Zabriskie, Chancellor. See *ante*, § 436.

able to allow it. Parties may stipulate to make it so, where the stipulation is reasonable; but, as in stipulated damages, if the stipulation is not reasonable, courts will not regard it.¹ The following examples will serve to show the effect of stipulations as to time. Where it was agreed that land should be conveyed and possession given, provided the price were paid on a particular day, and the purchaser died just before the time fixed for payment, it was held that the personal representatives of the deceased could not compel the vendor to convey.² A., having agreed with B. to rent him a store on his procuring C. as surety for the rent before a day named, which B. failed to do, it was held that B. was not entitled to a decree for specific performance, nor to an injunction.³ A lease provided that the lessee might purchase the premises at any time within five years, upon a written notice of thirty days of his intention so to do. It was held that the notice of thirty days was of the essence of the contract, and that a notice given two days before the expiration of the five years was insufficient.*

¹ *Richmond v. Robinson*, 12 Mich., 193. It was formerly held in England, that, in a contract for the sale and purchase of real estate, time could not be made of the essence of the contract, and that such an agreement would not be enforced any more than an agreement to limit the right of redemption by a mortgagor. But Lord Thurlow is said to have been the only English chancellor who adhered to that doctrine. Lord Loughborough, who had countenanced it, afterward, in *Lloyd v. Collet*, 4 Bro. C. C., 469, *n.*, said: "There is nothing of more importance than that ordinary contracts between man and man should be certain and fixed; and that it should be certainly known when a man is bound, and when he is not. It is one thing to say that time is not so essential that in no case in which the day has, by any means, been suffered to elapse, the court would relieve against it and decree performance. The conduct of the parties, inevitable accident, etc., might induce the court to relieve. But it is a different thing to say that the appointment of a day is to have no effect at all, and that it is not in the power of the parties to contract that if the agreement is not executed at a particular time, the parties shall be at liberty to rescind it." Lord Cranworth, V. C., in *Parkin v. Thorold*, 2 Sim. N. S., 1, held that when a purchaser had agreed that he would take a title if made at a given day, but otherwise that he would not, a court of equity could not, any more than a court of law, give relief to a vendor who had failed to make a title at the day specified. And he remarked that Lord Thurlow's dictum that a purchaser could not so stipulate, rested on no principle, and had often been repudiated as not truly expressing the doctrine of the court.

² *Jones v. Noble*, 3 Bush Ky., 694. And see *Shuffleton v. Jenkins*, 1 Morris, Iowa, 427; *Reed v. Breeden*, 61 Pa. St., 460; *Gale v. Archer*, 42 Barb., 320; *Troy v. Clarke*, 30 Cal., 419; *McClure v. King*, 15 La. Ann., 220.

³ *Mitchell v. Wilson*, 4 Edw. Ch., 697.

⁴ *Mason v. Payne*, 47 Mo., 517.

The same was held where a contract for the sale of land was to be void unless two notes were paid at maturity, the time of their payment to be regarded as of the essence of the contract, and one note was paid at maturity, and a tender of payment made of the other six days after it became due.¹ A contract of sale provided that the purchaser should build a house on the front of the lot within a specified time, or, in lieu thereof, should, on that day, pay to the vendor one thousand dollars as the first payment toward the purchase money; and that if the purchaser failed to perform all or any of the covenants, "at the time or times therein before limited," then, and in such case, all the covenants and agreements on the part of the vendor should cease and be absolutely void, and all the purchaser's right or interest in the premises, either at law or in equity, should cease. The purchaser having failed to fulfil at the time stipulated, and brought a suit for specific performance, it was held, affirming the decree of the vice-chancellor, that he was not entitled to equitable relief.²

¹ Heckard v. Sayre, 34 Ill., 142. The purchaser of city lots gave his note payable four months after date, in consideration whereof the owner of the lots contracted to give a deed of them upon the payment of the note. The note having become due, a deed tendered, and payment of the note demanded and refused, it was held that the purchaser was not entitled to specific performance of the contract. Pearis v. Covilland, 6 Cal., 617.

² Smith v. Wells, 7 Paige Ch., 22; S. C., 2 Edw. Ch., 78. In this case, Walworth, Ch., said: "Although in theory the interest is supposed to be a fair equivalent for the non-payment of money at the time agreed upon, we all know that, in point of fact, the person to whom it is due frequently sustains great losses in consequence of the disappointment, which the legal rate of interest cannot compensate. On the other hand, it frequently happens that the perfecting of the title, and the delivery of the possession of the premises at the time contemplated by the purchaser, is of essential benefit to him, which cannot be compensated by damages which are ascertainable by the ordinary rules of computing damages. It would, therefore, not only be unreasonable, but entirely unjust, for any court to hold that parties, in making executory contracts for the sale or purchase of real estate, should not be permitted to make the time of performance an essential and binding part of the contract in equity as well as at law, where, as in this case, the other party was fully apprised of the intention to insist upon a strict performance at the day. Here there was no such impossibility as might not have been foreseen and provided against by proper care and vigilance. Under such circumstances, if the property had very much increased in value after the making of the original contract, the defendant is fairly entitled to the benefit thereof under the agreement by which the complainant contracted to relinquish all claims upon the property, either at law or in equity, if he did not comply with the terms of the agreement at the day. And as there is nothing inequitable or

§ 462. *Proof that time was of the essence of the contract.*

—To render time essential, it must clearly appear that such was the intention of the parties; and it is not sufficient that a period is named, during which, or previous to which, something shall be done. The insertion, for instance, of a day for payment, does not make it essential.¹ So, of a day for the delivery of the abstract, although the purchaser, immediately upon the expiration of the time, refuses to proceed.² And the same has been held as to a day fixed for the completion of the contract.³ Time is made of the essence of a contract which provides that "In case of the failure of the said S. to pay the aforesaid sums of money at the dates aforesaid, or any part thereof, to the said L., his heirs or assigns, then the said S. shall forfeit to the said L. the sums already paid, and no deed shall pass for said land."⁴ Where the vendee gave a bond for the payment of the purchase money, provided a third person or his legal representatives or attorney in fact, should, on or before a certain day, release a specified portion of the land sold, it was held that time was of the essence of the contract.⁵ A. having a claim on public land, and being in possession, procured B. to enter the land, and took a lease from him,

unconscientious in her insisting upon this part of the contract, I think the vice-chancellor was right in not making a new contract for her contrary to the understanding of both parties when they entered into this agreement." A contract for the sale of a lot of land contained the following covenant: "In the event of failure to comply with the terms hereof by the party of the second part, the party of the first part shall be released from all obligations in law or equity to convey said property, and said party of the second part shall forfeit all right thereto." The purchaser, having neglected to make his payments without excuse for his delay, it was held that a court of equity would not relieve him from the consequences of his default. *Grey v. Tubbs*, 43 Cal., 359. *Rhodes, J.*, in delivering the opinion, remarked that courts "will not inquire into the motive, or the sufficiency of the motive, that induced the parties to contract that time should be essential in the performance of any of the agreements contained in the contract of purchase. But if it appears that the parties have thus contracted, courts of equity will not disregard the contract in order to give effect to some vague surmise that all the vendor intended to secure by the contract, was the payment of the purchase money with interest at some indefinite time."

¹ *Hearne v. Tenant*, 13 Ves., 287; *Knott v. Stephens*, 5 Oregon, 235.

² *Roberts v. Berry*, 18 Beav., 31, Affd. 3 De G. M. & G., 284.

³ *Parkin v. Thorold*, 16 Beav., 59; *contra*, S. C., 2 Sim. N. S., 1, per Lord Cranworth.

⁴ *Snider v. Lehnherr*, 5 Oregon, 385. ⁵ *Westerman v. Means*, 12 Pa. St., 97

agreeing to leave at the end of the term. The lease provided that if A. then paid B. one hundred dollars, he should have a quit-claim deed, and it was further stipulated that "the above shall be forfeited, if either shall not keep all the covenants." Payment not having been made by A. pursuant to the agreement, it was held that time was of the essence of the contract, and specific performance was refused.¹

§ 463. *Stipulation as to possession.*—If a contract for purchase provides that possession shall be given by a specified day, the word "possession" means possession with a good title. This would be the legal construction of the contract, and the construction is the same in equity. Where a person agreed to purchase leasehold premises for his own residence, and contracted that he should have possession by a certain day, but the vendor, although he tendered possession, failed to show a good title by the day named, it was held, reversing the decision of the vice-chancellor, that the stipulation as to time was of the essence of the contract, and the bill for specific performance was dismissed.² A court of equity will, however, decree specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion or for the steps toward completion, if it can do justice between the parties, and there is nothing in the stipulations, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere.

§ 464. *Time how reckoned.*—Where a contract for the sale of land provides that it shall be performed within a given time, the time runs from the date of the contract, and not from its delivery, unless, owing to delay in deliver-

¹ Usher v. Livermore, 2 Iowa, 117. When the contract makes time essential as to some of the conditions in the vendor's favor, the court will incline to consider it essential as to others against him. A vendor so situated "cannot fairly complain of being held strictly to the conditions themselves. . . . The plaintiff's proposition is, that the purchaser shall be held by a cable, and the vendor by a skein of silk." Knight Bruce in Seaton v. Mapp, 2 Coll. C. C., 556, 564.

² Tilley v. Thomas, L. R. 3, Ch. 61.

ing it, performance within the time is impossible or unreasonable. A bill filed by the purchaser for specific performance was dismissed where a contract containing the stipulation, "papers to pass within ten days," was dated March 19th, but was not signed and delivered until the 22d, and the purchaser did not tender performance until the 31st, and the evidence tended to show that the property had changed in value.¹ If a contract bears an impossible date, as February 30th, the time must be reckoned from its delivery.²

§ 465. *Limitation of time by notice.*—Although no time is fixed in the contract, a party will not be permitted to trifle with the interests of the opposite party by unnecessary delay ; and the latter may designate some reasonable time—not capriciously or unreasonably, or for the purpose of surprising the other, and thus getting clear of a bargain, but a reasonable time according to the circumstances of the case—within which he will expect performance, or that the agreement will be rescinded.³ The time named in the notice must be sufficient for the proper closing of the transaction ; and neither party will be permitted arbitrarily and suddenly to terminate the negotiations.⁴ Fourteen days were held not to be a reasonable time within which to require the vendor to produce a deed and complete the title.⁵ And where the vendor took more than six weeks to furnish the abstract, it was held an unreasonably short

¹ Goldsmith v. Guild, 10 Allen, 239. See Henry v. Jones, 8 Mass., 453 ; Blanchard v. Hilliard, 11 Ib., 85 ; Dugan v. Colville, 8 Texas, 126.

² Styles v. Wardle, 4 B. & C., 908.

³ Taylor v. Brown, 2 Beav., 180 ; Benson v. Lamb, 9 Ib., 502 ; Nokes v. Lord Kilmorey, 1 De G. & Sm., 444 ; Falls v. Carpenter, 1 Dev. & Batt. Eq., 237 ; Thompson v. Dulles, 5 Rich. Eq., 370. It was formerly held that time could not be made essential by subsequent notice. Radcliffe v. Warrington, 12 Ves., 326 ; Reynolds v. Nelson, 6 Mad., 18. Where a notice to complete, or the contract would be abandoned, was given by the vendor the 25th of January, and a negotiation which followed was terminated on the 5th of February, by the vendor's claiming immediate performance, and a bill for specific performance was filed by the vendee on the 4th of March, it was held that the vendee had proceeded with reasonable promptitude. Prothro v. Smith, 6 Rich. Eq., 324.

⁴ Taylor v. Brown, *supra* ; King v. Wilson, 6 Beav., 124.

⁵ Parkin v. Thorold, 16 Beav., 59.

time for him to insist on the purchaser's completing.¹ On the other hand, where a vendee brought a suit for specific performance two years after the vendor gave him notice that he had renounced the agreement, it was held that the vendee had lost his remedy in equity by his delay in filing the bill.² In a suit by the purchaser for specific performance, it appeared that, by the contract, payment of the purchase money was a condition precedent to the giving of the deed, that a small payment was accepted after default, and that a few months thereafter payment in full had been often demanded, and the purchaser notified that, if he did not pay, the vendor would have to sell the land to another, which, payment not having been made, was subsequently done. The bill was dismissed with costs, the court holding that the vendor was not bound to wait any longer on the purchaser, but that the vendor had a perfect right to exact immediate payment, or to sell the land to some one else.³ If the vendor has previously refused to remove an objection, a time to remove it, which, in the first instance, would have been regarded as insufficient, may be deemed reasonable, after which the purchaser may decline to proceed.⁴ And where notice to rescind was waived in case evidence of title was produced forthwith, which was not done, the bill was dismissed.⁵ So, an apparently short notice may be made reasonable by the nature of the contract. Thus, where A. contracted with B. to grant him the lease of a mine, and for that purpose to purchase the adjoining land, to procure the assignment of a term, and do other things

¹ *Pegg v. Wisden*, 16 Beav., 239.

² *White v. Bennett*, 7 Rich. Eq., 260.

³ *Hatch v. Cobb*, 4 Johns Ch., 559. Kent, Ch., "If the defendant had not parted with his interest before the filing of the bill, it might, even then, have been a point deserving of consideration, whether the plaintiff was entitled to assistance, when no accident, mistake, or fraud had intervened to prevent the performance of the contract on his part, and when, after indulgence, and after considerable subsequent delay, he had twice been required to make payment, and had omitted to do it. The acquiescence in his default, or the waiver of it, by the defendant, had terminated, before the assignment, by these calls for payment." See *Ballard v. Walker*, 3 Johns Cas., 60.

⁴ *Nott v. Ricard*, 22 Beav., 307.

⁵ *Stewart v. Smith*, 6 Hare, 222, n.

requiring time, and nine weeks having passed without A. informing B. when the contract was likely to be completed, B. gave A. notice to complete within a month, or the contract would be rescinded, it was held that as, owing to the subject matter of the contract which rendered expedition on the part of the lessor essential, the month's notice was reasonable.¹ A notice specifying a time within which a contract must be performed, to be operative, must be explicit. A notice that non-performance by a certain day would be regarded as equivalent to a refusal to fulfil the contract, is not tantamount to a notice that the contract would then be considered as rescinded.² It has been held that the notice, to be admissible in behalf of the plaintiff, must be in writing; but not when set up as a defence.³

§ 466. *Stipulation as to time liberally construed.*—Time is not usually considered of the essence of the contract, unless it distinctly appears that it was the design of the parties to make time essential.⁴ The plaintiff's failure should be such as to violate a condition precedent to his right to enforce the contract, or be such as to render the contract void if not reasonably excused, or in some other manner make it clearly inequitable that the plaintiff should have a decree.⁵ A stipulation that, in case of default, a party shall forfeit his rights under the contract, may have been inserted by way of a penalty merely, in order to induce a more prompt performance. When such was obviously the intention of the parties, if the party in default has acted in good faith, given a reasonable excuse for the

¹ MacBryde v. Weekes, 22 Beav., 533.

² Reynolds v. Nelson, *supra*.

³ Nokes v. Lord Kilmorey, *supra*.

⁴ Brumfield v. Palmer, 7 Blackf., 227; Ewing v. Crouse, 6 Ind., 312; Keller v. Fisher, 7 Ib., 718; Mathews v. Gillis, 1 Iowa, 242; Jones v. Robbins, 29 Me., 351; Walton v. Wilson, 30 Miss., 576; Pennock v. Ela, 41 N. Y., 189; Huffman v. Humner, 7 N. J. Eq., 263; Younger v. Welch, 22 Texas, 417; Runnels v. Jackson, 1 How. Miss., 358; White v. Butcher, 6 Jones Eq., 231; Smoote v. Rea, 19 Md., 398; Kercheval v. Swope, 6 Monroe, 362; Hanna v. Ratekin, 43 Ill., 462; Miller v. Miller, 25 N. J. Eq., 354. See Converse v. Blumrich, 14 Mich., 109.

⁵ Quinn v. Roath, 37 Conn., 16.

delay, and tendered performance with reasonable diligence, and the other party has sustained no damage by the delay, a court of equity will decree specific performance.¹ A contract for the sale of land on which there was a mortgage provided that the purchasers should satisfy and discharge the mortgage at maturity, and on or before a given day erect on the premises permanent improvements of a specified value, or, in the event that the said improvements were of less value than the sum named, that the purchasers, on or before the said day, should discharge so much of the principal of the mortgage debt as was equivalent to the difference between the value of the improvements erected and the said sum ; and if the purchasers failed to comply with their part of the agreement, then the agreement was to be void, and the land, with all the improvements thereon, immediately revert to the vendors. A suit having been brought by the purchasers for specific performance, it appeared that, although they had not fulfilled the terms of their contract, in respect either to the improvements or the payment, yet that, prior to the maturity of the mortgage, they had paid on account thereof a large sum. It was held that time was not of the essence of the contract, but that the provisions in relation thereto were inserted by way of penalty, and that, as the plaintiffs had acted in good faith, and the defendants had not been damaged by the delay, the plaintiffs were entitled to a decree.² Where a vendee re-

¹ *Scarlett v. Stein*, 40 Md., 512.

² *Steele v. Branch*, 40 Cal., 3. In *Seton v. Slade*, 7 Ves., 265, Lord Eldon said : " To say time is regarded in this court as at law is quite impossible. The case mentioned of a mortgage is very strong ; an express contract under hand and seal. At law the mortgagee is under no obligation to reconvey at that particular day ; and yet the court says that though the money is not paid at the time stipulated, if paid with interest at the time a reconveyance is demanded, there shall be a reconveyance upon this ground : that the contract is in this court considered a mere loan of money, secured by a pledge of the estate. But that is the doctrine upon which the court acts against what is the *prima facie* import of the terms of the agreement itself, which does not import at law that once a mortgage, always a mortgage. But equity says that. And the doctrine of this court as to redemption, does give countenance to that strong declaration of Lord Thurlow that the agreement of the parties will not alter it. For I take it to be so, in the case of a mortgage, that you shall not by special terms alter what this court says are the special terms of the contract. Whether that is to

ceived title upon a statutory foreclosure, agreeing to give the owner of the equity of redemption further time to redeem or purchase back, it was held that time was not so far of the essence of the contract as to prevent its enforcement upon equitable terms within a reasonable time after the expiration of the period specified.¹ Of course, if both parties are in default, neither can complain of non-performance at the time.²

§ 467. *Default of purchaser not a bar to relief.*—If time admits of compensation, as it perhaps always does when lapse of it arises from money not having been paid at a particular day, it is never an essential part of the agreement.³

be applied to the case of a purchase is a different consideration. I only say time is not regarded here as at law. So, in the instance of a mortgage with interest at five per cent., and a condition to take four if regularly paid; or at four per cent., with a condition for five if not regularly paid. At law, you might in that case recover the five per cent., for it is the legal interest. But this court regards the five per cent. as a penalty for securing the four; and time is no further the essence, than that if it is not paid at the time, the party may be relieved from paying the five per cent. by paying the four per cent., and putting the other party in the same condition as if the four per cent. had been paid; that is, by paying him interest upon the four per cent. as if it had been received at the time. So in this court before courts of law dealt with a bond under a penalty, as they do now. Time was of the essence there. But this court relieved against the penalty long before courts of law. And there are many other instances. But there is another circumstance. The effect of a contract for purchase is very different at law and in equity. At law, the estate remains the estate of the vendor, and the money that of the vendee. It is not so here. The estate, from the sealing of the contract, is the real property of the vendee. It descends to his heirs. It is devisable by his will; and the question whose it is, is not to be discussed merely between the vendor and vendee, but may be to be discussed between the representatives of the vendee. Therefore I do not take a full view of the subject upon the question of time, unless that is taken into consideration; and many nice and difficult cases may be put in which the question would be to be discussed between the representatives, founded upon the contract between the vendor and vendee. It is obvious that a due consideration of the value of the objections will embrace that consideration also. The cases seem to have varied a good deal. The cases before Lord Thurlow proceed upon this: that, in the nature of the thing, there must be a degree of good faith between the parties not to turn round the contract upon frivolous objections. As to the contract of the party, the slightest objection is an answer at law. But the title to an estate requires so much clearing and inquiry that, unless substantial objections appear, not merely as to time, but an alteration of circumstances affecting the value of the thing, or objections arising out of circumstances not merely as to time, but the conduct of the parties during the time—unless the objection can be so sustained—many of the cases go the length of establishing that the objection cannot be maintained.”

¹ *Moote v. Scriven*, 33 Mich., 500.

² *Crabtree v. Levings*, 53 Ill., 526.

³ *Gibbs v. Champion*, 3 Ohio, 335. *Glover v. Fisher*, 11 Ill., 666; *Andrews v. Sullivan*, 7 Ib., 327; *Reed v. Jones*, 8 Wis., 392; *Armstrong v. Pierson*, 5 Iowa,

Specific performance of an intestate's contract to convey was decreed, though the purchaser had not paid the balance of the price promptly, and had presented a claim against the estate to have refunded the instalment previously paid.¹ In another case, a decree was rendered in favor of the minor heirs and administrators of the purchaser of certain land, against the devisees and mortgagee of the vendor who was deceased, on a contract whereby the administrators were to pay, within a specified time, the amount due on the mortgage, and the mortgagee was to release to the devisees his interest in the land; and the devisees were to execute a conveyance of the land to the heirs who had taken possession. A demand for payment having been made by the mortgagee from one of the administrators and refused, the mortgage was subsequently paid off by the devisees, and the interest of the mortgagee in the land released to them. Afterward the devisees recovered the land from the heirs in ejectment, and the latter then tendered to the former the purchase money and interest, which was refused. Upon a suit in equity brought by the heirs against the devisees, an injunction was granted against the judgment in ejectment, and a conveyance of the land by the devisees decreed on payment to them of the full amount due, notwithstanding the land had risen a good deal in value.² Where a vendee of land had paid a large part of the purchase money, and a judgment was rendered for the balance, the interest on which was more than equalled by the rents and profits, it was held that a delay of eighteen years to enforce the con-

317; *Hall v. Delaplaine*, 5 Wis., 206; *D'Arras v. Keyser*, 26 Pa. St., 249; *Converse v. Blumrich*, 14 Mich., 109; *Magoffin v. Holt*, 1 Duvall, 95; *Crittenden v. Drury*, 4 Wis., 205; *Bromier v. Caldwell*, 8 Mich., 465; *Primm v. Barton*, 18 Texas, 206; *Keller v. Fisher*, 7 Ind., 718; *De Camp v. Crane*, 19 N. J. Eq., 166; *Shafer v. Niver*, 9 Mich., 253; *Showman v. Harford*, 55 Me., 197. See *ante*, § 436. Where, by the terms of an auction sale, part of the purchase money is to be paid to the auctioneer within a certain time, which is not done, his authority to receive the money is not revoked without an order to that effect from his principal. *Pinckney v. Hagadorn*, 1 Duer, 89. As to what was deemed due diligence in attempting to tender the purchase money, see *Hubbell v. Schoening*, 49 N. Y., 326.

¹ *Pritchard v. Todd*, 38 Conn., 413.

² *Linton v. Potts*, 5 Blackf., 397.

tract, was not a bar to a suit for specific performance.¹ Where a contract for the sale of land provided that upon failure of the purchaser to make his payments as they fell due, or to pay the taxes thereafter accruing, the contract should be forfeited, and that time was of the essence of the contract, and, the taxes not having been paid, the vendor paid them, it was held that as the purchaser shortly afterward tendered to the vendor the amount thus paid with interest, he was, notwithstanding his previous default, entitled to specific performance.² Nor does a subsequent agreement that if the whole amount be not paid on a certain day, the payment already made shall be forfeited and the original bargain be at an end, give any additional right to rescind.³ Where a subsequent agreement was not only positive that, in default of payment by a particular day, the articles sold should be delivered up, and the parties entered into an order of court to enforce performance of the subsequent agreement in equity ; on the ground that the agreement and order were in the nature of a penalty and intended only as security for the payment of money the court relieved against them on payment of principal, interest, and costs.⁴ On the same principle, equity relieves against the exercise of a legal right expressly arising out of a contract ; as in the case of a mortgage, or a right of entry for a forfeiture incurred by the non-performance of a covenant in a lease to pay the rent at a particular day, or against the forfeiture of the deposit by reason of the non-payment of the purchase money, or against the payment of a higher rate of interest if the principal be not paid by a day named. A. purchased land of B., paid one-third of the price, and took possession, it being agreed that B. should give a deed in three months, and that A. should give a mortgage payable in six and twelve months to secure the balance. The conveyance was not executed,

¹ McLaughlin v. Shields, 12 Pa. St., 283. ² McClartey v. Gokey, 31 Iowa, 505.

³ De Camp v. Feay, 5 Serg. & R., 323 ; Edgerton v. Peckham, 11 Paige Ch., 352.

⁴ Vernon v. Stephens, 2 P. Wms., 66 ; Clark v. Lyons, 25 Ill., 105.

nor the second instalment paid, payment having been suspended with the understanding that the interest should be paid instead. Meanwhile, A. having erected buildings on the lot, but neglected to make further payments, was, three years afterward, ejected by B., and two years subsequent to his ejectment he brought a suit for specific performance. It was held that A.'s equity was not extinguished by lapse of time, but that the parties might be deemed to sustain the relation of mortgagor and mortgagee.¹ The rule, however, that the interest is regarded as an equivalent for the non-payment of the purchase money at the time agreed, is not operative unless it is certain that the vendor has sustained no damage by the default of the vendee, and that the payment of the principal with the interest will place him in the position he would have occupied had there been no default. In every such case, the burthen of proof is on the vendee to account, in a reasonable manner, for his delay and to show that the relief he asks is just and equitable.²

§ 468. *Effect of possession on rights of party.*—Possession of land by a party under a contract of sale, especially if followed by improvements or by a material change in the condition of the property, will be deemed by the court a circumstance of very considerable weight in a suit for specific performance, where there has been delay in fulfilment on either side.³ In July, 1857, B., being in possession of

¹ Longworth v. Taylor, 1 McLean, 395.

² Taylor v. Longworth, 14 Peters, 172; Booten v. Scheffer, 21 Gratt., 474.

³ Crofton v. Ormsby, 2 Sch. & Lef., 604; Farley v. Vaughn, 11 Cal., 227. Possession by the purchaser, to excuse his delay in performing, must be a possession under the contract, and such that the vendor must know, or be taken to know, that the purchaser claims to be in possession under the contract. Mills v. Haywood, L. R. 6, Ch. D. 196. Where, in a suit for specific performance of a contract for the exchange of lands, it appeared that no money was to be paid, and that possession was taken pursuant to the contract, it was held that a delay of ten years was not a bar. Stretch v. Schenck, 23 Ind., 77. When a party has possession under a contract for a lease, pays his rent, and is in the enjoyment of all the benefits of the contract, delay will not be a ground for resisting performance. Clarke v. Moore, 1 J. & L., 723; Sharp v. Milligan, 22 Beav., 606. Where, under a contract for the lease of a shop and the sale of the stock, the intended lessee had been put in possession, had paid for the stock and also the rent, and the other party refused to execute the lease, considerable delay by the lessee after the lessor's refusal was held no ground for withholding specific performance, which, however, was granted without costs. Burke v. Smyth, 3 J. & L., 193. And see Ridgway v. Wharton, 6 House of Lds., 292.

real estate as the assignee of a lease, entered into an agreement with A. to accept from him a new lease, and pay six hundred pounds on the 1st of August thereafter, the day fixed for completion, with interest if the lease should not be completed on the day named. A draft lease was sent to B. for his approval, which was not returned, and nothing was done by A. toward insisting on completion. B. remained in possession and paid rent, but the six hundred pounds and interest were never paid or demanded. A. died in 1871. In a suit by A.'s executor, it was held that as B.'s possession and payment of rent must be referred to the new agreement, and not to a holding over after the expiration of the former lease, the lapse of time did not operate as a bar to specific performance, which was accordingly decreed, with interest on the six hundred pounds from the 1st of August, 1857.¹ In a suit brought by the executor of the vendor for specific performance, it appeared that the vendee under his purchase took the contract of a tenant who was in possession, and, acting upon this right, cut timber largely for himself, directed the tenant where and what fire-wood to cut, excused the tenant from liming the land extensively as he was bound to do by the lease, and that the want of ability of the executor to make title by the day appointed, was owing to a mistake of his authority as to the mode of executing the power of sale; that the vendee, when he discovered this, suddenly notified the executor that he rescinded the purchase on the same day, without allowing the executor a reasonable time to correct the error, and without paying or tendering payment for the damage he had done, or manifesting any intention to repair the mischief. The decree of the court below in favor of the plaintiff was affirmed with costs.² Where the vendee is in possession, and the vendor, without any fault on his part, has omitted, or from the state of the title has been unable,

¹ *Shepherd v. Walker*, L. R. 20, Eq. 659.

² *Bell's Appeal*, 71 Pa. St., 465. See *Larison v. Burt*, 4 Watts & Serg., 27.

to execute a conveyance, time is not usually essential, and if a good title can be made in a reasonable time, the purchaser will be compelled to accept it.¹ In an early case in New York it was shown that the plaintiff covenanted that he would convey to the defendant certain premises on or before the 1st of June, 1820, with a stipulation that the defendant might enter into immediate possession, which he accordingly did. At this time there was a mortgage on the premises, which remained until shortly previous to the filing of the bill in March, 1821, so that the plaintiff could not execute a conveyance giving a clear title at the time agreed. The chancellor having dismissed the bill, the court of errors reversed his decision, and directed that a master inquire whether the plaintiff could give a good title to the premises which he had agreed to convey, and if it were ascertained that he could, that a decree for the specific performance of the contract should be rendered.² In a suit by a vendor for the specific performance of the contract of purchase, it appeared that the vendee paid part of the purchase money, went into possession, and built on the land, but did not make all the improvements he desired in consequence of a pending suit brought by a third person to recover the land. This suit was not decided for a long time, so that the vendor could not give his vendee a title; but the suit was ultimately decided against the claimant. It was held that, upon the vendor giving the purchaser a good title with general warranty, the vendor was entitled to a decree; but that interest could not be allowed on the balance of the purchase money, except from the date of the verdict establishing the title.³ In the foregoing we have considered the effect of possession on the rights of the vendor. Similar considerations of course apply to the vendee when he is plaintiff.⁴ A person took possession of

¹ *Craig v. Martin*, 3 J. J. Marsh, 50. ² *Seymour v. Delancey*, 3 Cowen, 445.

³ *Wightman v. Reside*, 2 Dessaus Eq., 578.

⁴ See *Mason v. Wallace*, 4 McLean, 77; *Taylor v. Longworth*, 14 Pet., 172; *Armstrong v. Pierson*, 5 Iowa, 317. Where the answer to a bill admitted that

land under a verbal contract of purchase, and, with the permission of the owner, occupied and improved the same for a number of years, under the impression that he might pay for it when demanded ; and the purchaser offered to pay when notified to do so. It was held that he was entitled to specific performance of the contract.¹ A. contracted to convey to B. a portion of a certain survey, and B. took and held possession for thirty-eight years. A. died without having conveyed his right to B., or himself obtaining title ; but his devisee received a grant of the whole survey. It was held that the lapse of time was not a bar to a bill by B. against the devisee for specific performance.² Where a deed was not demanded until twenty-three years after the signing of the contract, but the purchaser, a toll-bridge company, had been in possession of the land during all that time, and laid out their road thereon, and there had been no change in the circumstances of the parties, but a conveyance had not been called for from a belief that the contract was sufficient, it was held that the company was entitled to specific performance.³ In a suit by A. against B. for the specific performance of the contract for the sale of a farm, it appeared that B., having bid off the farm and a quantity of personal property at a mortgage sale, verbally agreed to allow A. to remain in possession of the farm by paying the interest on the auction price of the same, and ultimately redeeming the property ; that, subsequently, the parties entered into a written contract by which B. leased the farm and personal property to A. for one year at a rent equivalent to the interest on the sums at which B. bid off the same, and also agreed that in case A. should, "at any rea-

a deed for land, absolute on its face, had been made as charged in the bill, upon a parol trust that such deed should be security for the payment of a sum of money, but relied upon a lapse of ten years as a defence, it was held that as the complainant had been in possession of the land all the time, the defence was not good. *Price v. Gaskins*, Phil. (N. C.) Eq., 224. See *Waters v. Travis*, 9 Johns, 450.

¹ *Ingersoll v. Horton*, 7 Mich., 405.

² *Williams v. Lewis*, 5 Leigh, 686.

³ *New Barbadoes Toll-Bridge Co. v. Vreeland*, 3 Green Ch., 157.

sonable time," pay to B. or secure to him the principal and interest he had paid on the property, he would convey the property to A. It further appeared that A. had continued in possession of the property, paying the stipulated interest, several years. Counsel for B. contended that the reasonable time within which A. had a right to pay for or secure the payment of the purchase price of the property and have a conveyance expired with the current year after the date of the contract. The court, however, in granting the prayer of the bill, held that the rights of the parties were to be adjudged as though a new agreement, with the clause concerning the sale of the property, had been made each year, or at the expiration of the period covered by the preceding one; especially as B. had stood by and seen the farm rendered more valuable by permanent improvements, without interposing any claim that the condition conferring on A. the right to purchase had become forfeited.¹ Where land was sold to be paid for at the expiration of seven years, the vendee to pay the interest annually, and also the taxes, and it was subsequently agreed that the interest should be compounded, and no part be paid until the principal became due, and the vendee took possession and made valuable improvements on the property with the vendor's knowledge, it was held that, upon default of payment at the expiration of the term of credit, the vendor could not rescind the contract as against judgment creditors of the vendee.² The fact that the instrument is in the

¹ Bellinger v. Kitts, 6 Barb., 273.

² Brock v. Hidy, 13 Ohio St., 306. In this case, a decree was entered ordering that "the cause be remanded to the court of common pleas, to take an account of the amount due to the defendant Hidy for purchase money, annual interest, and taxes paid by him, with interest thereon, deducting therefrom the net rents, issues, and profits of the premises during the time he has had possession of the same; that the premises be appraised, advertised, and sold as upon execution at law; that, out of the proceeds of such sale, Hidy be paid the amount due to him, and that the balance, after the payment of the costs herein, be appropriated to the payment of the judgments of attaching creditors; provided that unless the same shall, within six months from the entering of an order settling the amount due to the said Hidy, be sold for a sum sufficient to pay the same together with the costs herein, or unless the plaintiffs shall bring such sum into court for the use of the said Hidy, and the payment of such costs, then the

ordinary form of a bond with a clause that in case of a breach of the condition it shall be void, otherwise remain in full force, does not necessarily make time of the essence of the contract. But the circumstance that the obligee, with the knowledge and consent of the obligor, has entered upon and occupied the premises, and made improvements thereon, is ordinarily decisive to entitle him to the favorable interposition of a court of equity when it does not appear that there has been any other change in the value of the land, where time was not originally of the essence of the contract, has not been made so by notice, and he has not been guilty of laches in applying for relief.¹

§ 469. *Delay constituting a defence.*—No general rule can be laid down as to what will constitute a stale equity. This must depend upon the facts and circumstances of each case.² In an early case, a delay of fourteen months was held not to have such an effect.³ So, where there was a delay of more than fourteen months before the complainant offered to pay the full amount due, the court considered the extent of the delay, what had been paid, the conduct and motives of the parties, and all the circumstances which might have justified or excused the remissness, and decreed in his favor.⁴ In another case, the plaintiff having made improvements on the land to be conveyed to him, the court overruled a demurrer to the bill, though several years had elapsed after the contract before the suit was brought.⁵

petition herein be dismissed at the costs of the plaintiffs." Where a person makes another an offer to sell him land upon the performance of certain conditions, and the latter enters upon, commences to improve the land, and does all that he was required to do, it is too late for the person making the offer to recede. *Perkins v. Hadsell*, 50 Ill., 216.

¹ *Barnard v. Lee*, 97 Mass., 92.

² *Paschell v. Hinderer*, 28 Ohio St., 568. B. took the transfer of a land certificate to hold one-half in trust for A. in accordance with an agreement between A. and B. Four years after B. acknowledged the trust, the administrator of B. sold the land; and three months after such sale, and before the payment of the purchase money, A. brought a suit to enforce the trust. It was held that the claim could not be regarded as stale. *Hodges v. Johnson*, 15 Texas, 570.

³ *Marquis of Hertford v. Boore*, 5 Ves., 719.

⁴ *Glover v. Fisher*, 11 Ill., 666.

⁵ *Laverty v. Hall*, 19 Iowa, 526.

On the other hand, a delay for the following periods was considered fatal: three years and a half;¹ a year, seven months and thirteen days;² a year and nine months.³ Delay by a purchaser to decide whether or not he will accept the title, is unjust to the vendor, because the former can insist on performance, whatever the title, while the latter cannot enforce the contract unless he has a good title.⁴ While, however, a purchaser will not be permitted to lie by and not perform until he ascertains that the contract is one of profit, and then call for a conveyance, so neither will the vendor be permitted unwarrantably to delay the conveyance, and urge the rise in the value in the meantime, as a valid reason why he should be absolved from his contract.⁵ A. and B. agreed that B.'s judgments against A. should be paid in land at a value to be fixed by three persons named. A. having prevented the immediate carrying out of the agreement in order that the land might rise in value, it was held that he was not entitled to a decree for specific performance.⁶ Either party, when calling for performance after a great lapse of time, must satisfy the court that he did not wait to take advantage of fortuitous circumstances; but that during the whole period, he intended to fulfil.⁷ Where the parties differed as to the construction of the agreement, a bill for specific performance filed by one of them after a delay of seven years, was dismissed on account of the staleness of the demand.⁸

¹ Eads v. Williams, 4 De G. M. & G., 674.

² Southcomb v. Bishop of Exeter, 6 Hare, 213.

³ Lord James Stuart v. London & Northwestern R.R. Co., 1 De G. M. & G., 721. And see Harrington v. Wheeler, 4 Ves., 686; Guest v. Homfray, 5 Ib., 818; Thomas v. Blackman, 1 Coll. C. C., 313.

⁴ Spurrier v. Hancock, 4 Ves., 667; McClure v. Purcell, 3 A. K. Marsh, 61.

⁵ Low v. Treadwell, 12 Me., 441. See McClintock v. Laing, 22 Mich., 212.

⁶ Pillow v. Pillow, 3 Humph., 644.

⁷ Tiernan v. Roland, 15 Pa. St., 429. Where a contract for the sale of land was wholly executory, and a time fixed for payment of the purchase money, with an express condition of forfeiture if not paid at that time; and the purchaser did nothing to fulfil on his part, but waited several years after payments were due, and until there was a rise in value, and then brought suit, it was held that he was not entitled to a decree for specific performance. O'Fallon v. Kennerly, 45 Mo., 124.

⁸ Milward v. Earl of Thanet, 5 Ves., 720.

§ 470. *Value of property changing.*—Although when time is not of the essence of the contract, and the defendant has sustained no loss by a delay on the part of the plaintiff, specific performance will be decreed;¹ yet, when the circumstances are so changed that the defendant cannot be placed in the situation which he would have occupied if the contract had been carried out, the parties will be left to their remedy at law.² On a bill filed by a railroad company to enforce a contract to convey land three years after the vendor had refused to fulfil, and after the company had located their road over a portion of the land only, which in the meantime had risen in value, a decree for specific performance was refused.³ The plaintiff, having contracted with the defendant for the purchase of land, became insolvent and unable to fulfil, and, more than five years after the last payment had become due, the land suddenly rose in value from twenty-two dollars and a half per acre, the price agreed to be paid, to eighty dollars per acre. The vendee then tendered the purchase money and demanded a deed, which was refused. A bill for specific performance was thereupon filed by him, which was dismissed by the U. S. circuit court, and the decree affirmed by the U. S. supreme court.⁴ In February, 1867, a contract was made for the sale of land for the sum of fifty-two thousand dollars, one-third to be paid in hand, and the balance in

¹ Townsend v. Lewis, 35 Pa. St., 125; Sharp v. Trimmer, 24 N. J. Eq., 422. As where the vendee took possession by mutual consent, delivery of the deed being postponed to a future day, its prompt delivery having been prevented by a disagreement as to the terms of payment, and a deed subsequently tendered on the original terms. Ibid.

² McKay v. Carrington, 1 McLean, 50; Demarest v. McKee, 2 Grant Pa. Cas., 248; Callen v. Ferguson, 29 Pa. St., 247; Pickering v. Pickering, 38 N. H., 400; Peters v. Delaplaine, 49 N. Y., 362; Hubbell v. Van Schoening, Ib., 326; Ruckman v. King, 19 N. J. Eq., 360; Johns v. Norris, 22 Ib., 102. After a delay of seven years a decree for specific performance was refused, notwithstanding the plaintiff had expended a large sum, and default was first committed by the defendant, which probably prevented fulfilment by the plaintiff, where, owing to a change of circumstances, neither party could derive the full benefit of the contract if it were enforced. Pratt v. Carroll, 8 Cranch, 471. See Norris v. Knox, 1 Pittsb., 56.

³ Boston, etc., R.R. Co. v. Bartlett, 10 Gray, 384.

⁴ Brashier v. Gratz, 6 Wheat., 528.

two equal annual instalments, with interest. The purchaser paid only five hundred dollars down, and did not offer to pay either instalment when due. A bill for specific performance having been filed by him in July, 1873, after the property had greatly risen in value, it was held that the delay was fatal.¹ There is no instance in which the delay has been unreasonable, and without sufficient excuse, and the property has greatly fallen in value, a court has decreed specific performance. Under such circumstances, it would not be in the power of the court to place the parties in the condition they would have been had the contract been performed; and this is a sufficient reason why a court of equity will refuse to enforce the contract.² Where the vendor of an unfinished house agreed to complete it in three months, but did not do so until after eleven months, and the house had in the meantime greatly declined in value, the court refused to decree specific performance.³ A vendee, who had made a deposit on his purchase, was allowed to withdraw it and abandon the purchase, because the vendor had neglected to give him an abstract of title for more than seven months, and in the meantime there had been a material depreciation in the value of the property.⁴ Where the title of the vendor to one-sixth of the property sold was doubtful, for the reason that no deed of it to him could be found, though such a conveyance was in fact on record in the clerk's office, and had eluded search because it had not been indexed, and, before the deed was found, the property had greatly depreciated in value, it was held that the purchaser would not be compelled to take it.⁵ In an early case in New York, where land was sold under a decree in a partition suit, and the title was not perfected

¹ Roby v. Cossitt, 78 Ill., 638.

² Cooper v. Brown, 2 McLean, 495. See Reddish v. Miller, 27 N. J. Eq., 514.

³ Colcock v. Butler, 1 Dessaus Eq., 307.

⁴ Lloyd v. Collett, 4 Bro. C. C., 469. And see Fordyce v. Ford, *Ib.*, 494; Seton v. Slade, 7 Ves., 265.

⁵ Griffin v. Cunningham, 19 Gratt., 571.

until ten months thereafter, the land having meanwhile materially depreciated in value, it was held that the purchaser was discharged from the contract by the delay.¹

§ 471. *Excuse for delay.*—Even where time is not of the essence of the contract, if relief is sought in equity by one who has not complied with the strict terms of his contract, he must make out a case free from doubt, show that the relief asked for is equitable, and account in a reasonable manner for his delay, and apparent omission of duty.² When a party has failed to perform his part of the contract without a sufficient excuse, and there has been no acquiescence in the delay by the other party, the court will not in general decree specific performance;³ and the defendant need not show that he has sustained any special injury or inconvenience.⁴ A vendor who brought a suit for specific performance three years and a half after the time fixed for fulfilment, without having given notice in the interim of his intention to insist on the enforcement of the contract, or excusing the delay, was held not entitled to a decree.⁵ But a delay by the administrator of the vendor, before filing a bill for specific performance, of two and a half months after taking out letters of administration, which is on the day the deed was to have been delivered, will not be a bar to the maintenance of the suit.⁶ A. sold land to B. and agreed to execute a conveyance upon the payment of a second instalment. Before the time for conveyance

¹ Jackson v. Edwards, 22 Wend., 498.

² Cleveland v. Burton, 11 Vt., 138; Goodell v. Field, 15 Ib., 448; Young v. Daniels, 2 Iowa, 126; Lewis v. Woods, 4 How. Miss., 86. The rule that where the delay or neglect has been without just excuse, and there is no longer a prevailing and decisive equity to sustain his claim, the party will be left to his remedy at law, is true not only as to agreements generally, but applies to awards founded on agreements; for equity interferes in respect to awards only as growing out of agreements. McNeil v. Magee, 5 Mason, 244.

³ Boyd v. Schlessinger, 49 N. Y., 301; Craig v. Leiper, 2 Yerg., 193; Beach v. Dyer, 93 Ill., 295.

⁴ Benedict v. Lynch, 1 Johns Ch., 370; Bowles v. Woodson, 6 Gratt., 78. But it is otherwise if the delay be excused and time was not essential. Morgan v. Bergen, 3 Neb., 209.

⁵ Delavan v. Duncan, 49 N. Y., 485. ⁶ Miller v. Miller, 25 N. J. Eq., 354.

A. became insane and died, leaving a widow and infant heirs, and a deed was made under an order of court. Upon a bill for specific performance, filed by the administrator and heirs, it was held that the fact that the complainants had not conveyed, was no objection to the suit.¹ Vendees in possession, who were to pay for the land by instalments, paid the last instalment to the administrator of the vendor, and then brought an action at law to recover back the purchase money for a breach of the covenant to convey. The heirs of the vendor having filed a bill to enjoin the judgment and for specific performance, it was held that, as there was no fault on the part of the vendor during his life, and the heirs being infants at the rendering of the judgment, were incapable of conveying, and the vendees had sustained no injury, the heirs were entitled to a decree.² When the alleged failure is on the part of the vendee, and the court, having regard to the substance of the contract, finds that the delay of payment has not operated injuriously to the vendor, that the condition of the parties is the same it was when the payment should have been made, and that the same justice can be done under the circumstances as if the payment had been made at the time stipulated, the court will not refuse its aid; especially if there is a reasonable excuse for the default.³ Where the vendee had made a large payment, and expended several hundred dollars in improvements, but was prevented from completing by pecuniary embarrassments, and compensation for the delay had been tendered by the original purchaser's assignee, it was held that the latter was entitled to specific performance.⁴ A purchaser refused to accept a

¹ Boyce v. Prichett, 6 Dana, 231.

² Nesbit v. Moore, 9 B. Mon., 508.

³ Longworth v. Taylor, 1 McLean, 395; Morgan v. Scott, 26 Pa. St., 51; Trimble v. Elliott, Wright, 310; Farris v. Bennett, 26 Texas, 568; Galloway v. Barr, 12 Ohio, 354; Spaulding v. Alexander, 6 Bush, Ky., 160; Williston v. Williston, 41 Barb., 635; Hubbell v. Van Schoening, 49 N. Y., 326; Pennock v. Ela, 41 N. H., 191; Barnard v. Lee, 97 Mass., 92. If a complainant has been in no default, and has attempted to enforce his contract, a great lapse of time will not bar a bill for specific performance. Coulson v. Walton, 9 Pet., 62.

⁴ Ewins v. Gordon, 49 N. H., 444.

deed and comply with the contract on his part, for the reasons that there was a judgment of record against a former owner, which was in fact satisfied, but the satisfaction was not entered of record, and a third person was in possession of part of the land as a mere squatter. It was held that if the objections were well founded, and urged in good faith, the delay was excusable.¹ Where the holder of a bond for the conveyance of land gave it up, and received a deed from one who had no title to the land, and, after a lapse of twenty years, filed a bill for specific performance, it was held that equity would revive and enforce the bond against the proper parties.²

§ 472. *Time consumed in treaty.*—Delay pending a negotiation between the parties will not bar relief, even though the treaty be conducted without prejudice to a notice given by one party that he considers the contract rescinded.³ But it is otherwise, when the negotiation concerns a matter which is not the cause of the delay. Thus, where disputes arose as to the title and a valuation incident to the purchase, and the want of means of the purchaser, and not the disputes, was the cause of delay, specific performance was refused at the suit of the purchaser.⁴ When the delay has been occasioned by the defendant, he cannot avail himself of it as a defence.⁵ So, where a party creates delay by raising an unfounded objection, he cannot make the delay a ground for refusing to perform the contract.⁶ Remaining in possession, if under an arrangement to that end, will not affect the question of laches.⁷ So, the fact that the purchaser has permitted the deposit to remain in the hands of the vendor from the time he considered the

¹ Hoyt v. Tuxbury, 70 Ill., 331. ² Buck v. Holloway, 2 J. J. Marsh, 163.

³ Southcomb v. Bishop of Exeter, 6 Hare, 213.

⁴ Gee v. Pearse, 2 De G. & S., 325.

⁵ Morse v. Merest, 6 Mad., 36; Shrewsbury & Brighton R.R. Co. v. London & Northwestern R.R. Co., 2 M'N. & G., 324, 355; Ridgway v. Wharton, 6 House of Lds., 292.

⁶ Monro v. Taylor, 3 M'N. & G., 713, 723.

⁷ Southcomb v. Bishop of Exeter, *supra*.

contract rescinded, until the commencement of the suit, has been held not to affect such question.¹

§ 473. *Consequences of long delay in general.*—Although, as a rule, it is not competent for one of the parties to put an end to or rescind a contract without the assent of the other, yet an unjustifiable default is equivalent to an assent to a rescission of the contract, and will be so regarded, unless acquiesced in by the other party.² The doctrine is well settled, that great delay of either party unexplained, in performing the contract, or when he claims specific performance in filing his bill, or in prosecuting his suit after the bill is filed, constitutes such laches as to forbid the interference of a court of equity, and to amount to an abandonment of the contract on his part.³ And time, as

¹ *Watson v. Reid*, 1 R. & M., 326. It was the opinion of a learned English judge, Sir John Romilly, in *Lord James Stuart v. London & Northwestern R.R. Co.*, 15 Beav., 513, that time does not run as laches where land is taken under a railway act, until the termination of the period during which the company has power to construct the road, for the reason that, until then, the company cannot know certainly whether the land will be required. But this view was not adopted by the court. A mere verbal claim, unaccompanied by any act, will not prevent delay from operating as laches against the party making the claim, nor keep alive the right that would otherwise be barred. *Clegg v. Edmondson*, 26 L. J. Ch., 673.

² *Remington v. Kelley*, 7 Ohio, 432; *Higby v. Whitaker*, 8 Ib., 198; *Buckmaster v. Grundy*, 3 Gilman, 626; *Marston v. Humphrey*, 24 Me., 513; *Shortall v. Mitchell*, 57 Ill., 161. A court of equity will not enforce the specific performance of an agreement where the defendant offered to fulfil at the time agreed, but the plaintiff then declined to carry out the contract. *Schmidt v. Livingston*, 3 Edw. Ch., 213; *Gale v. Archer*, 40 Barb., 320; *Tibbs v. Morris*, 44 Ib., 138; ditto *v. Harding*, 73 Ill., 117. For a person will not be permitted first to repudiate the obligations of a contract, and then ask a court of equity to specifically enforce it. *Milward v. Earl of Thanet*, 5 Ves., 720, *n.*; *Eads v. Williams*, 4 De G. M. & G., 691; *Roberts v. Lovejoy*, 25 Texas Supp., 437; *Payne v. Graves*, 3 Leigh, 561; *Conrad v. Lindley*, 2 Cal., 173; *Hubbard v. Gray*, 21 Ark., 501; *Walworth v. Miles*, 23 Ib., 653; *McClellan v. Darrah*, 50 Ill., 249. But although the rejection by a party of the offer, excuses the other party from performance as a condition precedent, yet it does not release the latter from his obligation to perform so long as he insists upon the agreement. *Cooper v. Pena*, 21 Cal., 403; *Garrett v. Lynch*, 45 Ala., 204; *Foley v. Crow*, 37 Ind., 51.

³ *Getchell v. Jewett*, 4 Me., 350; *Sarter v. Gordon*, 2 Hill Ch., 121; *Grundy v. Wilson*, Litt. Sel. Cas., 129; *King v. Hamilton*, 4 Pet., 311; *Ludlow v. Cooper*, 13 Ohio, 552; *Higby v. Whittaker*, 8 Ib., 198; *Richardson v. Baker*, 5 Call, 514; *De Cordova v. Smith*, 9 Texas, 129; *Smith v. Hampton*, 13 Ib., 459; *Childress v. Holland*, 3 Hayw., 274; *Hemphill v. Miller*, 16 Ark., 271; *Kirby v. Harrison*, 2 Ohio St., 326; *Haughwort v. Murphy*, 2 N. J. Eq., 118; *Lawrence v. Lawrence*, Ib., 317; *Merritt v. Brown*, Ib., 401; *Madox v. McQueen*, 3 A. K. Marsh, 400; *Morgan v. Bergen*, 3 Neb., 209; *Callon v. Ferguson*, 29 Pa. St., 247; *Dubois v. Baum*, 46 Ib., 537; *Miller v. Henlan*, 51 Ib., 265; *Vanzant v.*

heretofore shown, may be essential independently of the question of abandonment, as when, after the time at which a party should have fulfilled, circumstances occur which materially alter the value of the property, or diminish the benefit of the contract. An interval of fifteen months, between the signing of the agreement for the sale of a patent, and the tender of a deed would need to be amply excused.¹ Delay on the part of the plaintiff is a sufficient ground for refusing to compel specific performance of a contract, even where an action at law might still be brought.² Courts of equity have, at all times, upon general principles of their own, even where there was no analogous statutable bar, refused relief to stale demands when the party has slept upon his rights, and acquiesced for a great length of time.³ Delay for the following periods has been held to constitute a bar to the maintenance of a suit for specific performance: thirty-seven years;⁴ thirty-four years;⁵ thirty years;⁶ twenty years;⁷ eighteen years;⁸ eight years;⁹ and a delay for a few months, or even for

New York, 8 Bosw., 375; Hough v. Coughlan, 41 Ill., 131; Taylor v. Merrill, 55 Ib., 52; Alexander v. Hoffman, 70 Ib., 114; Fitch v. Willard, 73 Ib., 92; Ditto v. Harding, Ib., 114; Hedenberg v. Jones, Ib., 149. Equity will not aid a party in enforcing a contract when, by his own laches, the rights of third persons without notice would be affected. Ins. Co. v. Union Canal Co., Bright Pa., 48. The ordinary principles which require promptness in the assertion of the right to specific performance, apply with peculiar force where no consideration is given. Pigg v. Corder, 12 Leigh, 69. As a general rule, to sustain an implication of the abandonment of the contract, the conduct of the party ought to be such as to lead the mind of a reasonable person to arrive at that conclusion. The attempt of a vendor to resell the property, or the unequivocal exercise of ownership over it, without explanation, showing that he did not consider the contract as still in force, might be such an act. Garnet v. Macon, 6 Call, 308.

¹ Bellas v. Hays, 5 Serg. & Rawle, 427.

² Lloyd v. Collett, 4 Bro. C. C., 469, *n.*; Pollard v. Clayton, 1 K. & J., 462; Mills, *ex parte*, L. R. 6, Ch. 594.

³ Cholmondeley v. Clinton, 2 J. & W., 151.

⁴ Ewing v. Beauchamp, 6 B. Mon., 422.

⁵ Tate v. Conner, 2 Dev. Eq., 224.

⁶ Ritson v. Dodge, 33 Mich., 463.

⁷ Baird v. Baird, 5 J. J. Marsh, 580; Williams v. Hart, 116 Mass., 513.

⁸ Johnston v. Mitchell, 1 A. K. Marsh, 225.

⁹ Brink v. Steadman, 70 Ill., 241. Of course, no definite rule can be laid down as to time constituting laches. In one case, a lapse of twenty-seven years was held no bar to a decree for specific performance. Huffner v. Dickson, 2 Har. & Johns, 46.

several days, may sometimes have that effect. An antenuptial agreement contained a recital that it was entered into with the desire and purpose that suitable provision should be made for the comfortable maintenance of the wife "as far as may be, beyond the casualties and contingencies to which men and business are exposed," and provided that the husband, in lieu of dower, and of every other claim by her against his estate, should procure, as soon as practicable, fifty shares of bank stock, and immediately convey them to a trustee in trust to pay the income to the husband during his life, and afterward for the benefit of the wife, and that if the parties lived five years after marriage, the husband should thereafter pay annually to the trustee two hundred dollars during their joint lives, to be held and disposed of in the same manner as the bank stock. The bank stock was not conveyed to the trustee until nearly four years after the marriage, and the payments of two hundred dollars a year were not made during the life of the husband, which continued more than fifteen years after the marriage. A bill filed by the executors of the deceased husband was dismissed with costs, on account of his delay to perform his part of the contract for such a length of time.¹ When the contract is in anywise unilateral, as in the case of an option to purchase, delay on the part of the purchaser in complying with it, is regarded with especial strictness; for then laches would be more easily fixed upon the vendee than where the contract was of the ordinary character. The court will, in such case, exercise its discretion with great care, and scan closely the conduct of a party claiming the benefit of such a contract.²

§ 474. *Delay to make title.*—A vendor who delays to

¹ Sullings v. Sullings, 9 Allen, 234.

² Allen v. Hilton, 1 Fonbl. Eq., 432; Brooke v. Garrod, 27 L. J. Ch., 226; Estes v. Furlong, 59 Ill., 298. Where a bond was conditioned to make title as soon as the obligor should get one, a defence to the bill of the obligee on the ground of lapse of time, was held not good, as he had no precedent condition to perform to entitle him to the enforcement of the contract. Koen v. White, Meigs (Tenn.), 358; see Mitchell v. Long, 5 Litt., 71.

tender a conveyance for an unreasonable time, and until an action has been brought for the purchase money paid, and who applies to a court of equity for a perpetual injunction against that action, and asks that the purchaser may be compelled to receive a deed, without showing any excuse for the delay, or that the land has depreciated in value, or that there has been a change of circumstances, will not be entitled to relief.¹ Where the vendor delayed making title until the interest on the purchaser's debt had accumulated to a large sum, the court refused to compel the vendee to accept a confirmation of title, and pay the remainder of the purchase money.² A delay of several years, together with a sale of a portion of the premises, would be strong evidence of abandonment of the contract, and of course bar a suit for specific performance as against the original purchaser.³ But a mere delay to make title for three years, was held not to have such an effect.⁴ In a suit for the specific performance of an agreement, it appeared that, in 1863, the plaintiff contracted to sell land and certain personal property to the defendant free from the incumbrance of dower; that the contract was partially performed by the execution of a deed to the defendant, who paid part of the purchase money and gave his note in Confederate money for the residue; that in 1867 the plaintiff tendered to the defendant a deed for the dower interest, and demanded payment of the note in United States currency; and that the defendant refused to complete, because the personal property had not been delivered, and because the fulfilment of the other part of the contract had been unreasonably delayed by the plaintiff. It was held that the suit could not be maintained, but that, as the contract was fair and understood by the parties when

¹ *Anderson v. Fry*, 18 Ill., 94; *Cadwalader's Appeal*, 57 Pa. St., 153; *Watts v. Waddle*, 6 Pet., 389; *Harris v. Kidwell*, 7 J. J. Marsh, 382; *Taylor v. Porter*, 1 Dana, 421; *Pratt v. Carroll*, 8 Cranch, 471.

² *Williams v. Mattocks*, 3 Vt., 189.

³ *McGalliard v. Aikin*, 2 Ired. Eq., 186.

⁴ *Osborne v. Bremar*, 1 Dessaus Eq., 486.

they entered into it, there was no equity calling for its rescission.¹

§ 475. *Unexcused delay of purchaser.*—Laches of the vendee, depriving him of the right to insist upon the contract of sale, may consist simply in neglecting to make his payments, or to fulfil some other essential condition, or, in not only failing for a long period to fulfil on his part, but by lying by and seeing the property sold to a third person, or in neglecting to file a bill to enforce the contract against the vendor. The usual maxim is, that a party seeking specific performance, must show himself ready, desirous, prompt, and eager to perform the contract. Where, in a contract for the conveyance of land, no time is fixed for payment and delivery of the deed, payment must be made in a reasonable time, or on request.² The delay of the purchaser without excuse which will preclude a decree for specific performance in his behalf, may, as we have seen, be measured by years, or months, according to the circumstances of the particular case. But, be the time long or short, when it indicates a virtual abandonment of the contract on his part, it will deprive him of all just claim to equitable interposition.³ Where a person contracted for land by an

¹ Addington v. McDonnell, 63 N. C., 389. Where A. indorsed notes to B., in consideration of which B. agreed that on payment of the notes by the makers, or by A., he would convey to A. certain land, and B. did not take the proper steps to collect the notes of the makers, it was held that as he had discharged the indorser by his laches, he was bound to convey. Hall v. Green, 14 Ohio, 497.

² Andrews v. Bell, 56 Pa. St., 343. A purchaser at a sheriff's sale paid the price, and took possession of the land. The judgment debtor knew of, and acquiesced in, the claim of ownership until after the purchaser had sold and removed from the State with all of his property. The sheriff having died after making due return of the execution, but before he had executed a deed to the purchaser, it was held that the laches of the latter would not prevent a court of equity from granting relief at the instance of the sub-purchaser by decreeing a divestiture of the title out of the defendant in execution. Stewart v. Stokes, 33 Ala., 494. A vendee of land has a right, when there is an apparent incumbrance thereon, to a reasonable time for investigation, although he has not stipulated for an abstract of title, or for a preliminary examination. Allen v. Atkinson, 21 Mich., 351.

³ Finch v. Parker, 49 N. Y., 1; Mann v. Dunn, 2 Ohio St., 187; Rose v. Swann, 56 Ill., 37; Howe v. Rogers, 32 Texas, 218; Campfell v. Hicks, 19 Ohio St., 433; Gentry v. Rogers, 40 Ala., 442; Sprigg v. Albin, 6 J. J. Marsh, 158; Brewer v. Connecticut, 9 Ohio, 189; Weber v. Marshall, 19 Cal., 447; Scott v. Barker, 14 Ohio, 547; Bracken v. Martin, 3 Yerg., 55; Bennett v. Welch, 25 Ind., 140; Eppinger v. McGreal, 31 Texas, 147; Fuller v. Hovey, 2 Allen, 324; Broadus

agent, who represented himself in the transaction as the principal, and it was agreed that the deed should be given September 1st, and sooner, if the purchaser required it, one-half of the purchase money to be paid when the deed was delivered, and the real purchaser, between whom and the vendor there had been no personal communication as to the purchase, left the State on the 1st of September, and did not return until two weeks thereafter, it was held that the vendee had been guilty of such neglect as to bar his right to specific performance.¹ In a suit brought by the purchaser for the specific performance of a contract of sale, it appeared that by the contract the first payment was to be made on or before the 5th of the next January; that the time was extended until the 16th of the same month, when it was agreed that payment should be made in full; that the vendor, who resided in Canada, was waiting to have the matter closed; that the complainant, instead of keeping his engagement, went away, and did not return until two or three days after the time set for completion, and that the vendor went home, but left the deed with an agent; that the latter saw the complainant soon after his return, and informed him that he had the deed ready for delivery, but the complainant was not ready to pay; that on the 23d of January complainant wrote to the vendor expressing his disappointment in not having been able to pay, saying that money was scarce, and he could not negotiate his paper without making more of a sacrifice than he was willing to submit to, and offering to pay part down, and the residue in two, three, and four years; that five days thereafter, he had an interview with the vendor's agent, and stated that he would be ready to pay, except for a lien he had discovered on the

v. Ward, 8 Mo., 217; Thompson v. Bruen, 46 Ill., 125; Peck v. Brighton, 69 Ib., 200; Mix v. Baldue, 78 Ib., 215; Green v. Covilland, 10 Cal., 317; Patterson v. Martz, 8 Watts, 374. A decree for specific performance was denied, it appearing that for seventeen months the purchaser had done nothing to perform his part of the contract, although she had previously paid money on it, and before suit had not offered to perform, or demanded performance. Bullock v. Adams, 20 N. J. Eq. (5 C. E. Green), 367.

¹ Ives v. Armstrong, 5 R. I., 567.

property in the form of a decree for alimony; and that two months subsequently, the complainant made a formal tender of the money, and demanded a conveyance, which was refused. The decree of the court below dismissing the bill, was affirmed.¹ Where it appeared that the defendant verbally agreed to buy property at a sheriff's sale for the benefit of the judgment debtor, the latter promising to pay for and take the property within sixty days after the sale, which, however, he did not do for over two years, and meanwhile the defendant was permitted to do many things as owner of the property, such as fencing, ditching, and selling some of it, it was held that the agreement could not be specifically enforced.² If the purchase money, on a contract for the sale of land, fall due in the life-time of the vendee, a long delay in making payment after his death, will not be excused by the fact that the heirs are infants.³ Where there was a delay of fifteen years in making the last payment due on a contract to convey land, and the only excuses offered for

¹ Shortall v. Mitchell, 57 Ill., 161. In this case, the court said: "The object of the defendants in making the sale, was to raise immediately a considerable sum of money. For that purpose, the first payment, which was to have been made on the 5th, was extended by agreement to the 16th, and the entire purchase money was then to be paid. But Shortall not only did not pay at that time, but admitted to George Mitchell his inability to do so, and, on the 24th, wrote to Alexander the letter above described, in which he virtually repudiated the contract. In view of these facts, we are at a loss to understand on what ground he can claim the court should compel these defendants to make him a deed. He has paid them nothing. He has disappointed them by failing to pay when he promised, although they were anxious to complete the contract. Even if he was ready to pay on the 28th but for the decree for alimony, it was then too late to make that offer the basis of relief; for he had virtually repudiated the contract, not on the ground of the decree, but because he could not make the payment. The alimony had, however, been satisfied in another manner; and in view of the entire correspondence, we are inclined to the opinion that Shortall was aware of the fact, and that the talk about the alimony on the 28th, was for the purpose of gaining further time. But whether so or not, is immaterial, as he had already admitted his inability to pay, and had proposed a new contract. If the defendants had brought suit against him, the apparent lien upon the record might be of some importance. When, however, he is seeking the aid of the court, he cannot excuse his non-payment on the 16th, or his letter of the 24th, by alleging that on the 28th, he, for the first time, discovered there was an apparent lien, though there was none in fact. Before he claims to have had any knowledge of this apparent lien, he had lost the right to ask a court of chancery for a decree of specific performance, by showing himself either unable or unwilling to perform his part of the contract."

² Merritt v. Brown, 21 N. J. Eq., 401.

³ Henry v. Corm, 12 Ohio, 193.

the delay were, the great intimacy and friendship between the parties, the civil war, the purchaser being a citizen of Tennessee, the death of the purchaser, and the minority of his heirs, a decree for specific performance was refused.¹

§ 476. *When vendor entitled to resell property.*—Gross laches by the purchaser of land in performing his part of the contract, will justify the vendor in selling to a third person without first tendering the money already paid.² A purchaser of land, refusing to fulfil the contract, filed a bill to set it aside, and to recover such of the purchase money as he had paid. To this bill the vendor answered that he was willing and able to perform; and the vendee, in an amended bill, filed three years afterward, prayed for specific performance, when the vendor alleged that he had sold to another. The land having in the meantime risen in value, it was held that, as the vendee had trifled with his contract, he was not entitled to a conveyance.³ Where a purchaser of land paid the first instalment, and then did not move in the matter for six years, in the meantime alleging defect of title and his own inability to comply with the contract, and the vendor sold the property to another person who entered and made improvements, it was held that the second vendee could hold the land, no fraud or collusion being shown in the second sale.⁴ A vendee of real estate did not bring a suit for specific performance until after a delay of twelve years, and it appeared that after suffering the property to be sold under a mortgage which he had assumed the payment of as part of the purchase money, he wrote to the vendor claiming that it was the duty of the latter to redeem the property, which had been purchased in the name of a third person. The vendor answered that he had no claim or interest in the premises, and it was insisted by the vendee that he was misled by this, and induced to bring

¹ Walker v. Douglass, 70 Ill., 445.

² Mason v. Owens, 56 Ill., 259.

³ Williams v. Starke, 2 B. Mon., 196.

⁴ Hawthorn v. Bronson, 16 Serg. & Rawle, 269.

an action to recover back what he had paid, and thus delayed in commencing his present suit. As the vendor was not obliged to disclose his interest, if he had any, and the vendee was notified, before he brought his present suit, of the circumstances of the sale under the mortgage, it was held that a sufficient excuse for the delay had not been given, and that the decree of the court below dismissing the bill must be affirmed.¹ In a suit by the vendee against the vendor of land for specific performance, it appeared that in July, 1868, one A., being the owner of certain real estate, contracted to sell it to the plaintiff for five hundred dollars. Two hundred dollars were paid at the execution of the agreement, and A. gave his bond to convey the land to the plaintiff upon the payment of three promissory notes in one, two, and three years. The plaintiff thereupon took possession of the land, and began to improve and cultivate it down to the fall of 1871, but erected no buildings, and never permanently resided on the land. In February, 1872, the plaintiff, having sold the fences to one M., left the premises, and was never afterward in possession or exercised any authority over them. About this time the plaintiff wrote to A., inclosing forty dollars, which A., three days thereafter, returned in a letter as follows: "Learning soon after seeing your brother here last month, that you had abandoned my land, after having stripped it of all fencing, I took possession of it, and cannot now consent to take part of the overdue interest, and allow the matter to run along for years as in the past. I regard the contract as cancelled, and return the order." The first note, and one year's interest on the second and third notes, were paid, but nothing afterward. In May, 1872, A. conveyed the property to M., who paid for it five hundred dollars cash, and fifty-one dollars for taxes past due. M. went into peaceable possession, built a house on the property, and otherwise improved it, and held possession at the

¹ Iglehart v. Gibson, 56 Ill., 81.

commencement of the suit. It was held that the facts showed gross negligence on the part of the plaintiff, both in performing his part of the contract, and in applying for relief; and a judgment rendered for the defendant in the court below, was affirmed.¹

§ 477. *Forbearance to bring suit.*—Long delay in taking any proceedings to enforce a contract, after the party is entitled to its fulfilment, will be a defence to his suit when finally brought, unless there are circumstances which show that the delay was induced, or at least sanctioned, by the other party, or some other equity has intervened requiring a specific performance.² Land was conveyed to a trustee in

¹ *McDermid v. McGregor*, 21 Minn., 111. Where the complainant stood passively by, two years after he had been notified that the premises would be sold, and more than eighteen months after a sale had been made, without taking steps to enforce the contract, it was held that he was not entitled to a decree. *Gariss v. Gariss*, 2 N. J. Eq. (1 Green), 79.

² *Van Doren v. Robinson*, 16 N. J. Eq., 256; *Preston v. Preston*, 5 Otto, 200. The vendor is not required to wait indefinitely after the failure of the purchaser to comply with the terms of his agreement. If the payments are not made when due, he may, if out of possession, bring ejectment; or he may institute proceedings in equity to foreclose the right of the vendee to purchase, in which case the decree usually gives the purchaser a definite time within which to perform. *Keller v. Lewis*, 53 Cal., 113. Where a vendee, who had taken no active steps to enforce the contract of sale for nearly seven years after he might have made payment and enforced his contract, it was held that such delay, unexplained, indicated an abandonment of the purchase, and barred his right to equitable relief. *McLaurie v. Barnes*, 72 Ill., 73. In another case, a vendee, who had slept on his rights for five years, was refused a decree. *McWilliams v. Long*, 32 Barb., 194; *S. P., McMillin v. McMillin*, 7 T. B. Mon., 560. The court declined to enforce an agreement to execute a mortgage, after a delay, in filing the bill, of eight years. *Nelson v. Hagerstown Bank*, 27 Md., 51. Where a parol agreement was made for the sale of land, and subsequently recognized by the vendor in writing, when he expressed a willingness to perform it, and after this the purchaser removed from the State, and took no steps toward completion of the contract, during which time the vendor expended a considerable amount of money in improving the land, on a bill filed by the purchaser ten years after the parol, and six years after the written agreement, it was held that he had lain by too long, and was not entitled to specific performance. *Francis v. Love*, 3 Jones Eq., 321. In one case, ten years was held ample time within which to seek specific performance of a contract to convey, unless there was a good excuse for the delay. *Glasscock v. Nelson*, 26 Texas, 150. An interval of eleven years in asserting any rights under a contract, during which time the complainant paid no taxes on the property, or exercised any ownership over it, but allowed a subsequent purchaser without notice to improve the premises, was held to be a delay which ought to bar any claim to relief in equity. *Iglehart v. Vail*, 73 Ill., 63. Similar cases have occurred, with the same result, where the delay was for thirteen years. *Conway v. Kinsworthy*, 21 Ark., 9; *Fitch v. Boyd*, 55 Ill., 307. Where a purchaser of land not in possession slept on his rights for more than fourteen years, without taking any step toward entitling himself to a conveyance, it was held

trust to grant a lease of mines under the same to certain persons for forty-two years, and, at the request of the lessees made at any time thereafter, to grant a further lease of the same mines for twenty-one years, to commence at the expiration of the first term; the first lease to contain a covenant of renewal for the second term. The lease of forty-two years was made accordingly. Shortly before the expiration of the first term, the lessees applied for renewal, which was refused. No proceedings were taken to enforce performance of the covenant or trust, for upwards of two years after the refusal. It was held that, so far as the right to renewal depended on the covenant, the delay or acquiescence would be a defence in equity.¹

§ 478. *Consenting to delay*.—Specific performance of a contract may be decreed in favor of a party who has failed to perform his part of the agreement, if he can show an acquiescence in the delay by the other party, or an acceptance by him of a substitute for a literal performance.² Where a contract for the sale of land provides that upon default of the vendee in making his payments at the time agreed, the vendor may re-enter and take possession, and that all right and interest of the vendee under the contract shall cease, and all payments and improvements made by the vendee be retained by the vendor as liquidated damages,

such laches as was fatal to his equity. *Dubois v. Baum*, 46 Pa. St., 537. See *King v. Hamilton*, 4 Pet., 311. In another case, fifteen years' delay in calling for the specific performance of a contract to convey land, the vendor having in the meantime died, was held a circumstance of great weight against the complainant, and that, although it did not of itself bar the suit, yet the court would require more strict and full proof, and would scrutinize the evidence. *Eyre v. Eyre*, 19 N. J. Eq., 102. Where the vendee, after paying the purchase money, waited sixteen years before bringing his suit for specific performance, the statutory bar in similar cases at law being ten years, it was held that, in the absence of any strong equitable circumstances, the contract, after such a long delay, could not be enforced. *Johnson v. Hopkins*, 19 Iowa, 172. In two other cases in which a decree was refused, the delay was respectfully for seventeen and eighteen years. *Peters v. Delaplaine*, 49 N. Y., 362; *Watson v. Inman*, 23 Texas, 531. For a case of protracted delay, see *Holt v. Rogers*, 8 Pet., 420. For delay with failure of proof, see *Calvert v. Nichols*, 8 B. Mon., 264.

¹ *Walker v. Jeffreys*, 1 Hare, 341.

² *Hutchison v. McNutt*, 1 Ohio, 14; *Koen v. White*, Meigs Tenn., 358. See *Mitchell v. Long*, 5 Litt., 71.

the equitable rights of the vendee do not become *ipso facto* forfeited by his failure to pay at the time stipulated, without anything done on the part of the vendor indicating an intention to insist upon such forfeiture ; especially after the payment of a considerable portion of the purchase money. But the vendor must re-enter, or do something equivalent.¹ If a person be let into possession of land under a contract for its purchase, and no steps be taken by either party to enforce the agreement, it will be presumed that each is satisfied, and neither can insist on lapse of time as a bar to a suit for specific performance.² In case both parties are in default, each impliedly waives strict performance as to time, and the contract remains in force.³ Where neither party performed or offered to perform on the day fixed in the contract, and the purchaser remained in possession several days afterward, it was held that his continued possession precluded him from rescinding the contract, on the ground that the other did not perform upon the precise day. In such case, if no time be fixed, a reasonable time will be allowed.⁴ A purchaser, who is in possession under a contract of sale, will not for that reason be compelled to accept a bad or defective title. Neither will his possession justify the vendor in unreasonably delaying the title, or deprive the purchaser of the right to complain of delay. But so long as he retains possession, it is, unless under peculiar circumstances, so far a waiver of all previous objections, whether of defect of title or delay in completing it, that if the title is made to him while still in possession, he must accept it.⁵

§ 479. *Vendor neglecting to insist on fulfilment.*—If the

¹ Morris v. Hoyt, 11 Mich., 9. See Staley v. Murphy, 47 Ill., 241.

² Miller v. Bear, 3 Paige Ch., 466; Scarlett v. Hunter, 3 Jones Eq., 84.

³ Van Campen v. Knight, 63 Barb., 205. Before the defendant in a suit for specific performance can insist on the antiquated nature of the claim, he must show that he has performed, or been ready to perform, the conditions precedent on his part, and that the complainant has omitted some obligation or duty ; and then, from the lapse of a reasonable time for performance by the complainant, and his default, a relinquishment of the contract by him, or a rescission of it, may be presumed. House v. Beatty, 7 Ohio, 417.

⁴ Benson v. Tilton, 24 How. Pr., 494. ⁵ Thompson v. Dulles, 5 Rich. Eq., 370.

time for the performance of a contract is not essential, and the vendor has shown indulgence, he cannot suddenly insist on a forfeiture. Where a vendee met his first payments, and, having become insolvent, the vendor allowed him to retain possession of the property for three or four years and make valuable improvements, and afterward tendered him a deed which was not in accordance with the agreement, without offering to return what had already been paid, it was held that the vendee was entitled to specific performance on payment of the purchase money.¹ Under a parol agreement for the sale of land by A. to B., B. took possession, made improvements, and from time to time paid small sums on account of the purchase money. Six years later A. conveyed the property to C., who had knowledge of all the facts, with the understanding that C. was to fulfil the contract between A. and B., and that the land would be paid for by the labor of B. for C. Sixteen years after the conveyance to C., B. offered to pay whatever remained due, and demanded a deed, which C. refused to give. It was held that the fact that B. continued to occupy and make improvements, increasing the value of the property far beyond the purchase money and interest due, or likely to become due, and without any claim of rent by C., and with his knowledge and apparent acquiescence, and that B. labored for C. at times, during the whole period, pursuant to the agreement, and C. had had the opportunity, if he did not in fact avail himself of it, to make applications for labor upon the debt due for the purchase money, if not sufficient to authorize a presumption of payment, was quite enough to show a waiver and to estop him from making any claim founded on lapse of time.² A court of equity will not permit a vendor, who has received part of the purchase money and lain quietly by, seeing the vendee expend large sums in improvements without demanding the balance due, to forfeit the contract when he

¹ *Murphy v. Lockwood*, 21 Ill., 611.

² *Green v. Finin*, 35 Conn., 178.

has sustained no injury by the want of an exact performance.¹ A vendee took possession of land under a contract for its purchase, payment to be partly on time. When the balance was due the vendor made no formal demand, but said that he was ready to execute a deed when the money was paid, and after the time for payment had elapsed, the vendee tendered the amount due, which the vendor refused to accept. It was held that the vendee was entitled to relief.²

§ 480. *Vendor not objecting to delay.*—A recognition of the contract as still subsisting will constitute a waiver of the default of the other party.³ A bill to compel specific performance of a bond for conveyance upon payment of a stipulated sum on or before April 1st, which alleged possession and improvements made by the complainant with the defendant's knowledge and consent, and a tender of the price with interest on May 25th next ensuing, was held not demurrable.⁴ Where a vendor, more than a year after the sale, received three-fourths of the purchase money without objection, and, two months thereafter, the vendee brought a suit to compel performance, it was held that he was entitled to a decree.⁵ A distinct recognition by the vendor of the vendee as owner of the land, and asking him

¹ Farley v. Vaughan, 11 Cal., 227.

² Ahl v. Johnson, 20 How., 511.

³ Eubank v. Hampton, 1 Dana, 343; Logan v. M'Chord, 2 A. K. Marsh, 224; Durand v. Sage, 11 Wis., 151; Brassel v. McLemore, 50 Ala., 476. Where a purchaser of real estate at an auction sale paid ten per cent. of the purchase price, signed the usual memorandum of sale with the auctioneer, and shortly before the time agreed upon for the payment of the balance of the purchase money, tendered the vendor's agent a check for the amount, which the agent refused unless certified, but permitted the plaintiff to go for the certification, with the impression that the certified check would be received at any time during the day, and the purchaser two hours after the time fixed for performance tendered the check duly certified, and the land was the same day conveyed to a third person who had full knowledge of all the facts, in a suit for specific performance against the vendor and subsequent purchaser, it was held that the defendants having admitted the contract, and not having pleaded the statute, were to be deemed to have renounced the benefit of it; that performance at the precise time was waived; that tender not having been refused because not in money, the right to demand money was waived, and that the subsequent purchaser was properly required to convey to the plaintiff. Duffy v. O'Donovan, 46 N. Y., 223.

⁴ Barnard v. Lee, 97 Mass., 92.

⁵ Collins v. Vandever, 1 Iowa, 573.

to refund a year's tax the vendor had paid thereon for the year subsequent to the time fixed for completion, is evidence from which it may be inferred that the time of payment was waived.¹ A vendor, instead of declaring the contract forfeited because the first payment was not made at the time agreed, demanded payment, and, for a period of nearly two years, gave the vendee no notice that the contract was at an end, or did anything to dispose of the property. It was held that, in the absence of an express stipulation, these circumstances showed that the parties did not regard time as of the essence of the contract.² It was agreed in a contract of sale, that if the purchase money was not paid by a day named, which was about two years thereafter, the sale should be void, and the vendor have a right to enter upon the premises and possess the improvements. The vendee expended several hundred dollars in improving the property, but failed to make payment at the time set. It was held that, in such a case, a waiver would be inferred from slight circumstances; that if the vendor allowed the vendee to go on and make improvements without warning, after the time for payment had elapsed, and a right to the forfeiture had accrued, he could not insist on the condition as to time; and that upon the bill of the ven-

¹ *Mix v. Baldue*, 78 Ill., 213.

² *Mathews v. Gillis*, 1 Clark, Iowa, 242. Waiver of delay by a vendor accepting the money and giving a receipt for it, although there had been, as to a portion of the payment, both delay and depreciation of the property in value. *Hale v. Wilkinson*, 21 Gratt., 75. Cited and approved in *Ambrose v. Keller*, 22 Ib., 769. Plaintiff's bill alleged an agreement by respondent to convey a patent right to the plaintiff for a sum to be paid in instalments, partly in cash and partly in notes; that the written agreement erroneously made the whole amount payable in cash, and that another agreement was thereafter made and signed, making the amount partly payable in cash and partly in the obligations of the plaintiff. The proof showed that the second instrument did not contain a statement of all the material provisions designed by the parties to be included in the contract, and was signed by the respondent upon the representation of the plaintiff that it was wholly informal; that the respondent did not agree to take the plaintiff's notes without security, and that the only offer on the part of the plaintiff had been to pay part cash and give his notes for the balance. It was held that the bill could not be maintained, although the plaintiff offered to perform whatever the court should order; it appearing that the suit was not commenced until long after the proper time for performance on his part, and after important changes in the condition of the parties. *Ely v. McKay*, 12 Allen, 325.

dee tendering payment, and praying for a specific performance, or a rescission upon equitable terms, the vendor must either fulfil, by conveying the land according to the contract upon receiving payment of the purchase money and interest, or submit to a rescission.¹

§ 481. *Giving further time.*—The waiver may consist in the extension of the time for performance.² A vendee took possession of land under a contract, by the terms of which a deed was to be delivered and the money paid at a future time. Before the time designated, payment was extended, and the extension having passed, the vendor received partial payments, and the vendee asked for further time, which the vendor neither granted nor refused, and no deed was afterward made or money tendered. It was held that the contract was still in force.³ The corporation of the city of New York having sold real estate at auction, ten per cent. of the purchase money was paid to the comptroller. Completion of the purchase was postponed at the request of the comptroller; and, a new comptroller coming into office, completion was again postponed until the entry of the payment of ten per cent. was found; and the corporation then refused to give a deed of the land. It was held that the corporation was bound by the action of the comptroller, and that the statute of limitations did not begin to run against the suit for specific performance until the refusal to give a deed.⁴

§ 482. *Acts of party constituting waiver.*—An objection based on delay will be waived by conduct inconsistent with the intention to insist on it, whether time were originally of the essence of the contract, or afterward engrafted on it;⁵ as by continuing to negotiate and treating the contract

¹ Bellamy v. Ragsdale, 14 B. Mon., 364.

² Hull v. Sturdivant, 46 Me., 34; Schroepel v. Hopper, 40 Barb., 425; Laird v. Smith, 44 N. Y., 618; Bass v. Gilliland, 5 Ala., 76. See King v. Ruckman, 24 N. J. Eq., 556.

³ Wallace v. Pidge, 4 Mich., 570.

⁴ Miller v. New York, 53 Barb., 653.

⁵ King v. Wilson, 6 Beav., 124; Thompson v. Tod, Pet. C. C., 280; Vail v. Nelson, 4 Rand, 478.

as still in existence after the time for fulfilment has expired.¹ So, it has been held that the examination of the title by the purchaser after the day for completion will prevent his insisting on time as essential, even though a formal notice to abandon the contract may have been given.² But not where the purchaser, after protesting against the delay, treats concerning the title under protest.³ Nor can a person who prolongs a negotiation for the mere purpose of gaining time, avail himself of a delay thus caused.⁴ Where the purchaser has gone on negotiating beyond the time fixed, he must give a reasonable notice of his intention to abandon his contract if a title be not shown. Upon a contract for the sale of a house needed for immediate residence, the conditions were that the purchase should be completed on the 26th of February, on which day, the purchase money being paid, the purchaser was to take possession; but if, from any cause whatever, the purchase should not then be completed, the purchaser was to pay interest on the purchase money from that day until completed; and if any objections or requisitions as to the title should be made upon the delivery of the abstract, which the vendor was unable or unwilling to remove, the vendor was to be at liberty to annul the contract. The vendor failed to complete the contract by the day named; but negotiations were continued until the 7th of April, on which day notice was given by the purchaser of immediate abandonment of the contract. Upon a bill filed by the vendor for specific performance, it was held that as a possible postponement of the completion of the contract was contemplated by the terms of the agreement, time was not

¹ *Pincke v. Curteis*, 4 Bro. C. C., 329; *Wood v. Bernal*, 19 Ves., 220; *Southcomb v. Bishop of Exeter*, 6 Hare, 213; *Webb v. Hughes*, L. R. 10, Eq. 281; *Wiswall v. McGowan*, Hoff. Ch., 125; *Ramsey v. Brailsford*, 2 Dessaus Eq., 582; *Voorhees v. De Meyer*, 2 Barb., 37.

² *Seton v. Slade*, 7 Ves., 265; *Hipwell v. Knight*, 1 Y. & C. Ex., 401.

³ *Magennis v. Fallon*, 2 Moll., 561, 576.

⁴ *Morse v. Merest*, 6 Mad., 26; *Oriental Steam Co. v. Briggs*, 21 L. J. Ch., 241; *Gee v. Pearse*, 2 De G. & Sm., 325.

of the essence of the contract, and that, if that had been the case, the purchaser, by continuing the negotiations as to title after the day fixed for completion, had waived it, and could not rescind without reasonable notice. A decree for specific performance, with inquiry as to title, was accordingly rendered.¹ With reference to the time for payment, where the assignor of a lease claimed that the assignment had been forfeited by the non-payment of part of the purchase money at the time agreed, he was held to have waived the forfeiture by getting the assignee to pay the rent to the landlord, which was inconsistent with the claim that the agreement was at an end.² Where it was agreed that if the balance of the purchase money were not paid by a certain time, the contract should be void; and it was not paid, but the vendor permitted the purchaser to remain in possession, and took from him a warrant of attorney to confess judgment in ejectment, the condition was held waived.³ A subsequent correspondence as to the title was held to be a waiver as to the time for raising objections.⁴ And the same was held to result from the subsequent renewal of a negotiation as to price.⁵ It does not follow that because a party has waived the time within which an act is to be done, he has also waived the act. Accordingly, where a contract was entered into between A. and

¹ Webb v. Hughes, *supra*.

² Hudson v. Bartram, 3 Mad., 440. As to the effect of part payment on the rights of the purchaser, see Keegan v. Williams, 22 Iowa, 378.

³ Gardner, *ex parte*, 4 Y. & C. Ex., 503. A vendor of certain lots, who had given a bond for title, recovered judgment for the unpaid purchase money, and sold the lots with others, realizing nearly the full amount from the sale of the other lots, bought them himself, satisfied the judgment, and took a sheriff's deed. It was held that as the vendor had elected to hold the vendee to a performance of the contract by suing for and collecting the money due thereon, the vendee was entitled to a conveyance upon payment of the balance due after the vendor's accounting for the money received for the other lots sold under the judgment. Wright v. Leclair, 3 Clarke, Iowa, 221. In another case, where, after a delay of several years by the purchaser to fulfil on his part, the vendor recognized the obligation of the contract by an action to enforce a lien for the purchase money, and the vendee, answering to that action, offered to perform, it was held that the vendor could not be heard to object on account of the delay. Bennett v. Welch, 25 Ind., 140.

⁴ Cutts v. Thodey, 13 Sim., 206. ⁵ Eads v. Williams, 4 De G. M. & G., 674.

B., that the former should repair certain warehouses by the 1st of April, and that the latter should then take a lease of them, and the repairs were not made by the day named, and B. continued to deal in a way which amounted to a waiver of the time, and before the lease was executed the warehouses were destroyed by fire, it was held that B. had not waived the condition that the repairs should be made previous to his taking a lease, and that therefore the loss must be borne by A.¹

§ 483. *Waiver by silence of party.*—A waiver may be implied from a silent acquiescence in the delay ;² as by remaining in possession under a contract for a lease without demanding the lease.³ In August, 1856, the plaintiff agreed to let a house to the defendant for seven, fourteen, or twenty-one years, the defendant to keep the premises in repair, and paint and paper ; and the defendant was allowed to take possession. In 1859 the plaintiff agreed to accept W. as tenant in the defendant's place upon the same terms, the defendant guaranteeing the rent. Just previous to this, the defendant had given W. possession, and the latter paid the rent until 1863. In that year, the defendant gave notice to determine the tenancy at the end of the first seven years. W. and the defendant having both denied their liability to paint and paper according to the terms of the original agreement, the plaintiff, in 1864, filed a bill to compel the defendant to accept a lease. It was held that, even if the original agreement was not terminated by that of 1859, the plaintiff, after such delay and acquiescence, could not have specific performance. The bill was accordingly dismissed, but without costs, and without prejudice to any

¹ Counter v. McPherson, 5 Moo. P. C. C., 83

² Pincke v. Curteis, *supra* ; Potter v. Jacobs, 111 Mass., 32. The giving up of a contract for the sale of land, deliberately and designedly, for the purpose of having it cancelled and destroyed, might bar a suit for specific performance. But not the sending of it to the vendor at his request without saying or agreeing anything as to its being surrendered, cancelled, or destroyed. De Camp v. Crane, 19 N. J. Eq., 166.

³ Sharp v. Milligan, 22 Beav., 606.

remedy at law.¹ Where a purchaser, having taken possession of the land, paid part of the price, stipulated for the highest rate of interest on the balance, and made valuable improvements, and the vendor took no steps to demand or collect the residue, and, three months after the last payment was due, the vendee filed a bill for specific performance, a decree was granted.² When time is made essential by the act of one of the parties fixing a reasonable time for the completion of the contract, and giving notice to the other party of an intention to abandon the contract unless it is completed within the time fixed, if the latter does not assert his rights promptly thereafter, he will be deemed to have acquiesced in the notice, and to have abandoned his right to the equitable remedy.³ In one case, a delay of two years in bringing a suit after such notice, was held to deprive the plaintiff of the right to relief.⁴ In another case, a year's delay was considered to have the like effect.⁵ A purchaser of land, having made a small payment at the time of the contract, did not meet his subsequent instalments, and, several years afterward, the vendor notified him that the contract had long been forfeited, and the vendee took no steps to enforce the sale until three years subsequent to such notice, the land in the meantime having become more valuable, and been sold again by the vendor. It was held that the vendee was not entitled to specific performance.⁶ Acquiescence, by a party not in possession, in such notice, by a comparatively brief delay, may bar his right.⁷ Where real estate was likely to rise in value in the course of a few days, and the vendee, being notified on Saturday that the contract was at an end and could not be renewed except at an ad-

¹ Moore v. Marrable, L. R. 1, Ch. 217.

² Brink v. Morton, 2 Iowa, 411.

³ Reynolds v. Nelson, 6 Mad., 18; Wells v. Maxwell, 32 Beav., 408; Prothro v. Smith, 6 Rich. Eq., 324.

⁴ Heaphy v. Hill, 2 Sim. & Stu., 29.

⁵ Watson v. Reid, 1 R. & M., 236. And see Parkin v. Thorold, 16 Beav., 73.

⁶ Smith v. Lawrence, 15 Mich., 499. ⁷ McDermid v. McGregor, 21 Minn., 111.

vanced price, made no objection, and the vendor sold the property to a third person on Tuesday, a suit for specific performance brought by the original purchaser was dismissed.¹ But a notice of forfeiture may itself be waived, by continuing the transaction after the time named.²

¹ Hawley v. Jelly, 25 Mich., 94.

² King v. Wilson, 6 Beav., 124.

CHAPTER XVII.

DETERMINATION OF CONTRACT.

- 484. Effect in general of entering into new agreement.
- 485. Consequence of bringing in another party.
- 486. When new agreement may be verbal, or implied from conduct.
- 487. Parol agreement with part performance.
- 488. Altering contract without rescinding it.
- 489. Contract may be rescinded by parol.
- 490. What in general essential to constitute a rescission.
- 491. Rescission of contract after breach.
- 492. Entire contract must be rescinded.
- 493. Acts indicating a rescission of contract.
- 494. Contract must have been given up by both parties.
- 495. When party may elect to rescind contract.
- 496. Election to rescind must be made promptly.
- 497. Waiver of right to rescind.
- 498. Agreement for compensation and rescission.

§ 484. *Mode of effecting*.—It may constitute a defence that, although such a contract as is sought to be enforced was entered into between the parties, yet it no longer exists. In other words, it may be contended, either that a new agreement was substituted, or that the contract was rescinded by mutual consent. As a rule, the parties, if they continue *sui juris*, and capable of contracting, may determine the contract in either of these modes.¹ Of course, after the delivery of a second contract which has been substituted for the previous one, the first contract has no force or effect, and, by its assignment, a party can convey no rights to his assignee.² A vendee of land having failed to comply with

¹ In certain cases, a subsequent agreement to annul a previous one, will be inoperative. A debt cannot be absolved by a stipulation to take a less sum. *Inman v. Griswold*, 1 Cowen, 199; *Makepeace v. Harvard College*, 10 Pick., 298; *Geisner v. Kershner*, 4 Gill & Johns, 305. But an agreement by a creditor with his insolvent debtor, that if the latter will give security for a portion of the debt, the former will release the balance, is a valid contract. *Colborn v. Gould*, 1 N. H., 279.

² *McDonald v. Kneeland*, 5 Minn., 352; *Bagley v. Clark*, 7 Bosw., 94; *Munford v. Wilson*, 15 Mo., 540; *Lafferty v. Jelly*, 21 Ind., 471. See *Pierce v. Dorr*, 8 Pick., 239. When a new contract is inconsistent with, and renders the per-

the terms of the contract of sale, the parties entered into a new agreement, which was left in escrow, to be in force upon the performance of certain conditions which were not fulfilled. It was held that as the second agreement was a substitute for the first and was not fulfilled, there was no contract which the vendor could be compelled to perform.¹ A contract for the sale of land by A. to B., for which B. gave A. his promissory note payable at a future day with interest, provided that if the note were paid at maturity, the property should be conveyed to B. B. took possession of the premises under a lease, and agreed to pay a certain rent if he did not take up the note when it was due. The note not having been paid, and the relation of landlord and tenant established, it was held that it operated as a disaffirmance of the contract of sale.² Where a lessee, before the expiration of his term, takes a new lease, it is virtually a surrender of the previous lease. Such is the presumption from the second lease, because its acceptance is an admission by the lessee of the right and power of the lessor to make it. When, however, the circumstances show that it was not the intention of the parties to make such a surrender, the presumption will be overcome.³

§ 485. *Bringing in another party.*—The introduction of another party terminates the original agreement by establishing a contract between one of the original contractors and the new person. Accordingly, where A. sold shares to B. and B. sold them to C., and A. transferred them by deed to C., which C. refused to register, it was held in a suit for specific performance brought by A. against B., that A., by assigning the shares to C., determined the privity of contract with B., and that C. was not the mere nominee of B., but that there was a substantive contract between A. and

formance of a former one between the parties impossible, the former is rescinded, upon the same principle that a subsequent act of the Legislature repeals a former act when the two are inconsistent. Paul v. Meservey, 58 Me., 419.

¹ Price v. McGown, 10 N. Y., 465.

² Porter v. Vaughn, 26 Vt., 624.

³ Livingston v. Potts, 16 Johns, 28; Van Rennselaer v. Penniman, 6 Wend., 569; Abell v. Williams, 3 Daly, 17.

C.¹ Where A. and B. agreed in writing to compromise their conflicting land claims, and B. sold to C., and C. to others, without any reservation as to the rights of A., it was held that equity would not aid C. in enforcing the original agreement; the course pursued by the parties evincing an intention to abandon it.²

§ 486. *Validity of second agreement and how made.*—The new contract, to work a rescission of the old one, must be supported by some consideration, and be otherwise valid and binding.³ Where a person, having contracted to furnish materials and construct a building, refused to proceed in consequence of the rise in prices, and the other party told him to go on and complete the work and he would pay him for it what was right, it was held that the mutual promises formed a sufficient consideration to support the new contract.⁴ If an agreement which would have been legal if verbal, is nevertheless in writing, the new agreement need not necessarily be written.⁵ A written agreement not required by law to be in writing, may be varied or qualified at any time before a breach of it by a new contract not in writing, which can be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted on what will then be left of the written contract.⁶ A contract between parties was mutual, and to

¹ Shaw v. Fisher, 5 De G. M. & G., 596; Holden v. Hayn, 1 Mer., 47; Hall v. Laver, 3 Y. & C. Ex., 191; Stanley v. Chester & Birkenhead R.R. Co., 9 Sim., 264; S. C., 3 My. & Cr., 773.

² McIntire v. Johnson, 4 Bibb., 48.

³ Robson v. Collins, 7 Ves., 130; Thurston v. Ludwig, 6 Ohio St., 1.

⁴ Bishop v. Busse, 69 Ill., 403.

⁵ Henning v. U. S. Ins. Co., 47 Mo., 425; Ryno v. Darby, 20 N. J. Eq., 231.

⁶ Hewitt v. Brown, 21 Minn., 163. It is competent to add to or vary a written contract by a subsequent verbal agreement made on the same occasion before the parties separate, and following immediately upon the execution of the written contract, when the verbal agreement is within the scope of what the written contract contemplated might thereafter be verbally agreed upon by the parties. Field v. Mann, 42 Vt., 61. An alteration of an instrument under seal by parol, makes the whole contract parol. In such case, the terms of the written instrument are in effect adopted, and become a part of the parol agreement. Vicary v. Moore, 2 Watts, 451; Vaughn v. Ferris, 2 Watts & Serg., 46; Carrier v. Dilworth, 59 Pa. St., 406.

be performed by each at the same time. The plaintiffs bound themselves to deliver certain bonds on a day named in the contract, at which time the defendant was to pay the purchase price. After the contract was made, and before its maturity, the parties fixed on an hour when they would meet at the office of the plaintiffs on the day the contract matured, to perform it. It was held that this became a part of the agreement between them, and had the same force and effect as if the particular time and place of performance had been named in the original contract.¹ In equity, a written agreement may be changed by conduct creating the presumption of a new contract. "In ordinary partnerships nothing is more common than this, that though partners enter into a written agreement stating the terms upon which the joint concern is to be carried on, yet if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed these terms by conduct."² In a case in which it was decreed that an agreement for a partnership should be specifically enforced, the court directed an inquiry whether any, and what, changes had been made in the original agreement by the consent of the partners, and that the deed should be settled by the master in accordance with such changes.³ Where a parol agreement is followed by one in writing, the latter supersedes the former, and constitutes the only agreement between the parties; the parol agreement being regarded as mere treaty.⁴

§ 487. *Part performance of new agreement.*—When the first contract is required by law to be in writing, the second one must also be in writing. If, for instance, the relation

¹ Levy v. Burgess, 64 N. Y., 390.

² Lord Eldon, in Const v. Harris, T. & R., 496, 523; Geddes v. Wallace, 2 Bligh, 270, 297; Jackson v. Sedgwick, 1 Swanst., 460; Smith v. Jeyes, 4 Beav., 505.

³ England v. Curling, 8 Beav., 129.

⁴ Smith v. Henley, 1 Ph., 391.

of landlord and tenant is created by writing, an agreement for an abatement of rent must be in writing.¹ The new contract may, however, be by parol, notwithstanding the original one was in writing, if supported by acts of part performance.² Accordingly, where a lease of a house for eleven years, with the allowance of twenty pounds for repairs, was signed and sealed by the parties, and the lessee, finding that the repairs of the house would cost more than twenty pounds, expended a further sum in consequence of the promise of the lessor to enlarge the term, but without specifying for what term, the parol agreement was enforced on the ground that the laying out of the money was a part performance on the one part, which called for the performance of the parol agreement on the other.³

§ 488. *Making alterations in contract.*—Parties may, and often do, stipulate for some change in the terms of a contract, without having the arrangement amount to the substitution of a new agreement; as, for instance, for a reduction of rent. In a case of this kind, Lord St. Leonards said: "I should be sorry to hold, that because a landlord abates the rent for a time, or permanently, he therefore abandons the whole contract . . . I should do a most mischievous thing, were I to hold that a mere abatement of rent, which occurs every day, would altogether put an end to the existing contract, and create a new tenancy from year to year. The abatement of the rent was rather a confirmation of the existing tenancy, with a relaxation of one of the terms of it."⁴ So a contract will not be rescinded

¹ O'Connor v. Spaight, 1 Sch. & Lef., 305.

² Wallis v. Long, 16 Ala., 738. See Adams v. Nicholas, 19 Pick., 275; Hunt v. Barfield, 19 Ala., 117.

³ 5 Vin. Abr. 522, Pl. 38. Where parties made a new agreement revoking an old one under which land had been conveyed, and a house was paid as part of the consideration of the new agreement, it was held that one of the parties could not refuse to fulfil because the other had not executed a reconveyance of the land, no time having been fixed for that purpose. It was also held that a tender of the reconveyance was not an indispensable preliminary to the enforcement of the new agreement, and that the parties must be restored to their original rights before either could insist upon a rescission of the new contract. Anderson v. White, 27 Ill., 57.

⁴ Clarke v. Moore, 1 Jon. & Lat., 723.

by the suggestion of changes in it by a party for the purpose of facilitating its performance; otherwise, parties would be deterred from making concessions of any kind.¹

§ 489. *How contract may be rescinded.*—As a general rule, contracts can only be rescinded by the mutual consent of the parties.² Whatever will operate to discharge a contract according to the law of the place where it is made or to be performed, will discharge it everywhere.³ A contract which is required by law to be in writing, may in equity be rescinded by parol;⁴ and waiver by parol is therefore a sufficient answer to a bill for specific performance,⁵ rescission or waiver being in its nature subsequent and collateral to the agreement;⁶ although it has been claimed that an agreement to waive a purchase of land is as much an agreement concerning land as the original contract.⁷ Even a contract under seal may be rescinded in equity by a parol agreement.⁸

¹ *Monro v. Taylor*, 8 Hare, 51.

² *Gatlin v. Wilcox*, 26 Ark., 309. It is scarcely necessary to say that this rule has its exceptions. Where the court instructed the jury that it was competent for the parties to the contract to put an end to it by their mutual understanding and consent, but that neither could do it without the consent of the other, it was held error; for the reason that, under certain circumstances, one of the contracting parties may rescind without the consent of the other; as where concurrent acts are to be performed, and one of the parties refuses to perform his part of the contract. *Fletcher v. Cole*, 23 Vt., 114. See *Davis v. Townsend*, 10 Barb., 333.

³ *Story's Confli. of Laws*, Sec. 331; *Poe v. Duck*, 5 Md., 1.

⁴ *Goman v. Salisbury*, 1 Vern., 240; *Inge v. Lippingwell*, 2 Dick., 469; *Ilchester, ex parte*, 7 Ves., 377; *Backhouse v. Mohun*, 3 Swanst., 434, *n.*; *Buckhouse v. Crosby*, 2 Eq. Cas. Abr. 32, Pl. 44.

⁵ *Robinson v. Page*, 3 Russ., 114.

⁶ *Davis v. Symonds*, 1 Cox, 402; *Bell v. Howard*, 9 Mod., 305.

⁷ *Buckhouse v. Crosby*, *supra*, per Lord Hardwicke.

⁸ *Hill v. Gomme*, 1 Beav., 540; *Lady Lanesborough v. Ockshott*, 1 Bro. P. C., 151; *Keating v. Price*, 1 Johns Ch., 22; *Erwin v. Saunders*, 1 Cowen, 250; *Low v. Treadwell*, 12 Me., 441; *Cummings v. Arnold*, 3 Metc., 486; *Guthrie v. Thompson*, 1 Oregon, 353. As to whether the parol waiver or abandonment of a written contract would constitute a defence at law, see *Price v. Dyer*, 17 Ves., 356; *Goss v. Lord Nugent*, 5 B. & Ad., 58; *Harvey v. Grabham*, 5 A. & E., 61. Although, independently of the statute of frauds, the variation of a written agreement cannot be proved by parol, yet parol evidence is admissible of matters collateral to the contract. Thus, it may be shown by parol that an instrument purporting to be an agreement was signed conditionally, and so only in the nature of an escrow; this being a question *dehors* the writing. *Pym v. Campbell*, 6 Ell. & Bl., 370. An oral promise made by a mortgagee to the cred-

§ 490. *Fact of rescission how established.*—A negotiation for the abandonment of the agreement will not constitute a rescission of it, unless the circumstances show an intention of the parties that there should be an absolute abandonment and dissolution of the contract.¹ A party cannot treat the contract as binding and rescinded at the same time ;² but the parties must be deemed to have been restored to the condition in which they stood immediately before the contract was made.³ When the alleged agreement to rescind rests only in parol, it must be proved by acts which leave no doubt of the intent : such as cancelling the agreement or removing from the possession ;⁴ or, at

itors of the mortgagor to abandon his claim to the mortgaged premises provided they accept from the mortgagor another mortgage, and extend his time of payment, is void by the statute of frauds, and, notwithstanding the creditors comply with the conditions of the promise, they acquire thereby no right as against the original mortgagee. *Parker v. Barker*, 2 Metc., 423. At common law, parties cannot abrogate or modify a contract under seal, except by an instrument of the same character. Contracts in writing, not under seal, and verbal agreements, are called parol contracts, and placed on the same footing. Verbal agreements are of as high a grade as writings not under seal, and are subject to release, abrogation, or modification, by an agreement either verbal or written. *Bishop v. Busse*, 69 Ill., 403 ; *Rhodes v. Thomas*, 2 Carter, Ind., 638 ; *Sinard v. Patterson*, 3 Blackf., 353 ; *Smith v. Addleman*, 7 Ib., 119 ; *Woodruff v. Dobbins*, Ib., 582. If the contract varying the terms of or abrogating the sealed instrument has been performed, a defence founded upon such a change is sustained by the highest equity.

¹ *Robinson v. Page*, 3 Russ., 114 ; *Murray v. Harway*, 56 N. Y., 337.

² *Weeks v. Robie*, 42 N. H., 316.

³ *Hunt v. Silk*, 5 East., 449 ; *Espy v. Anderson*, 14 Pa. St., 308 ; *Conner v. Henderson*, 6 Gill & Johns, 424 ; *Battle v. Rochester City Bank*, 3 Comst., 88. An agreement to rescind may of course provide that a party shall not be restored to his former situation. Under a contract for the sale of land for the sum of twenty-five thousand dollars, four thousand dollars of which was to be paid down, and the balance in two instalments, the first payment was made, and afterward the parties indorsed on the contract the following : " For value received, we hereby cancel the annexed and within agreement, and mutually agree to, and discharge each other from all the covenants and agreements therein contained ; and the said Winton, the purchaser, hereby surrenders possession of the within described premises to the said Spring." It was held that, the agreement being canceled, the effect was not, as in the ordinary case of a rescission of a contract, to put the parties *in statu quo*, and that the purchaser was not entitled to a return of the four thousand dollars he had paid in part performance of the contract. *Winton v. Spring*, 18 Cal., 451.

⁴ *Lauer v. Lee*, 42 Pa. St., 165 ; *Washington v. M'Gee*, 7 T. B. Mon., 131 ; *Phelps v. Seely*, 22 Gratt., 573. To justify the divesting of a title to land on parol evidence that the deed of the same by mutual agreement was given up by the grantee to be cancelled, but afterward, without the knowledge or consent of the grantor, recorded, the preponderance of proof should be clear, and the evidence so convincing as to leave no reasonable doubt on the mind. *Hunter v. Hopkins*, 12 Mich., 227. As to what was deemed insufficient proof of the rescission of a sale of land, see *Pipkin v. Allen*, 24 Mo., 520.

least, if the agreement is unexecuted, it must be founded upon a new consideration, and be clearly proved.¹ It would be a sufficient consideration that by the parol agreement the party was induced to enter into engagements inconsistent with the performance of the original contract.²

§ 491. *Parol agreement to cancel contract of sale.*—After a simple contract is broken and damage thereby accrued, it cannot be discharged by parol without satisfaction or some consideration. But if the new agreement is upon a good consideration and performed by the defendant, it is a satisfaction and defence; and it makes no difference that the prior agreement is in writing and the new agreement verbal.³ Although a mere verbal promise after breach to cancel a contract of sale would be no defence to a suit upon it, yet if the contract were actually cancelled and the property surrendered, the contract would be at an end. The effect of such executed agreement is the same, whether the contract is sealed or unsealed. The obligation has then become discharged by the acts, rather than by the agreement of the parties. It is not always necessary that the instrument should be given up to be cancelled; though that would show conclusively the fact of rescission. On the other hand, if the contract remain in the possession of the parties as before, with no reason why it was not surrendered or cancelled on its face, especially if no change of possession has taken place, it would be a strong circumstance against the claim of rescission.⁴ C. sold to P. an

¹ Pratt v. Morrow, 45 Mo., 404. The consideration which gives validity to an agreement to rescind is the release and extinguishment of the former contract. Locomotive & Express Co. v. Erie R.R. Co., 37 N. J., 23; Cutter v. Cockrane, 116 Mass., 408.

² Huffman v. Hummer, 18 N. J. Eq., 83.

³ Cutler v. Smith, 43 Vt., 577.

⁴ Pratt v. Morrow, 45 Mo., 404. In Dearborn v. Cross, 7 Cowen, 48, the plaintiff sold certain real estate to the defendant, gave him a bond to make title, took from him his several promissory notes, and put him in possession. An action having afterward been brought on one of the notes, the defence was, that the contract of sale had been rescinded by a verbal agreement between the parties; and that the plaintiff, pursuant to that agreement, and with the defendant's consent, had re-entered, rented the house, and finally sold the entire property to another person. The title-bond had, however, never been surrendered or cancelled. It was held that the contract of sale had been discharged by the

undivided half of a parcel of land upon which were saw and grist mills, the price being paid partly in cash and partly in a note, and C. executed a title-bond to P. P. becoming dissatisfied with the business, agreed with C. for a valuable consideration to reconvey his interest in the mills to C. C. then conducted the business. Subsequently P. conveyed to B., who filed his bill against C. for specific performance of the first contract, which was resisted by the heirs of C., who filed a cross bill for specific performance of the second contract. It was held error to vest B. with title regardless of the second contract which had been partly performed by C.¹ Where A. agreed in writing to sell land to B., who went into possession, but, being unable to pay for it, abandoned the land, and consented that A. might sell it to C., who took possession under a verbal contract, but afterward gave it up without having made any payments, and A. resumed possession, it was held that a purchaser of both such contracts of sale could not enforce specific performance of either.²

§ 492. *Whole contract to be given up.*—To constitute the rescission of a written contract by a parol agreement, there must have been an abandonment of the entire contract, and not merely a waiver of some portions of it.³ Under a contract for the purchase of two parcels of land

new parol executed agreement. The court said: "The evidence given, and that which was offered to be given, show not merely an executory agreement to rescind the contract, but an agreement executed and carried into effect, by a surrender of the possession and a subsequent sale of the premises. The defendant Cross therefore could not enforce the contract against the plaintiff, and there seems to be no necessity for sending him to a court of equity in order to restrain the plaintiff from collecting the notes which were the consideration of the contract."

¹ Clark v. Barnett, 24 Ark., 30.

² Aldrich v. Putney, 11 Paige Ch., 204. The authorities are not uniform as to the effect of an unexecuted parol agreement to rescind a sealed contract for the sale of land founded upon a new consideration. But the better opinion is, that such agreements are valid. After a contract has been rescinded it cannot be renewed without the concurrence of both of the parties. Lassen v. Mitchell, 41 Ill., 101. A rescission of one contract cannot revive another agreement previously rescinded, without express words or a necessary implication to that effect. Oakley v. Ballard, Hempstead C. C., 475.

³ Goss v. Lord Nugent, 5 B. & Ad., 58; Price v. Dyer, 17 Ves., 356; Robinson v. Page, 3 Russ., 114. But see Jordan v. Sawkins, 1 Ves. Jun., 404.

for a specified sum, one of which is to be conveyed at the time, and the other upon payment for both, there must be a rescission, if at all, as to both parcels, it being an entire purchase, notwithstanding two-thirds of the purchase money are to be applied to one of the parcels.¹

§ 493. *When abandonment of contract presumed.*—An agreement to rescind the contract may be shown by circumstances, or by such a course of conduct as clearly indicates that that was the intention of the parties.² Very slight circumstances will be sufficient to show the assent of a party when it was obviously for his interest that the contract should be terminated.³ There is no fixed rule by which it can be determined whether or not a contract has been abandoned. Where a vendee alleges that the contract has been abandoned by the vendor, to sustain such allegation, he ought to show that the vendor committed such acts as would justify a reasonable man in believing that he acquiesced in the decision of the vendee to abandon the contract.⁴ If one of the parties fails to do what is necessary to enable the other party to perform, the contract may be considered as abrogated.⁵ So, any act by one or other party, which necessarily prevents the performance of the mutual undertaking, will constitute an abandonment. Whenever the conduct of either party can be viewed in no other aspect than as a relinquishment of the contract, the contract will be regarded as rescinded.⁶ A. and B., who were husband and wife, entered into a contract with C. whereby C. was to take possession of and manage a farm, and have one-third of the profits, and A. and B. the remaining two-thirds. Soon after taking possession, C. sold the stock on the farm and the farming implements, and leased the farm excepting

¹ Fay v. Oliver, 20 Vt., 118. An agreement to set aside an award will not have the effect to rescind an independent and distinct contract, though relating to the subject matter of the controversy. Simplot v. Simplot, 14 Iowa, 449.

² Wheeden v. Fiske, 50 N. H., 125; Green v. Wells, 2 Cal., 584.

³ Fine v. Rogers, 50 N. H., 125. See Wynn v. Garland, 19 Ark., 23.

⁴ Garnett v. Macon, 2 Brock., 185.

⁵ Chapin v. Butts, 6 McLean, 500.

⁶ Suber v. Pullin, 1 S. C. N. S., 273; Wright v. Haskell, 45 Mo., 489.

the dwelling-house and grounds around it. A few months subsequently A. died, no rent having been paid or offered to be paid by C. to him in his life-time or to his widow since his decease; and it appeared that C. was insolvent and unable to carry on the farm under the contract. It was held that there had been an abandonment of the contract, and that B., who owned the farm, was entitled to its possession.¹ A sale of the land by the vendor to a third person, is a rescission of the contract of sale.² So is the bringing of ejectment to recover the land which is in the possession of the vendee under a parol contract of sale.³ Likewise the surrender of a written contract of sale, followed by acts inconsistent with its continuance.⁴ A written agreement not under seal between two partners that certain land of the firm shall be assigned to one of them as his separate property, is merely executory, and if the partners afterward execute deeds of the land to third persons, the agreement is thereby annulled.⁵ A. having entered into a contract with B. to sell him certain real estate for the sum of two hundred and fifty-eight dollars, part of which was paid down, and the balance to be paid when A. should make title, and A. having afterward requested B. to pay such balance, which B. refused to do, not because A. had not actually executed a conveyance, but for the reason that B. had bought an adverse title to the land, and occupied it under the same, it was held such an abandonment of the contract by B., as to

¹ *Tibbatts v. Tibbatts*, 6 McLean, 80.

² *Little v. Thurston*, 58 Me., 86; *Warren v. Richmond*, 53 Ill., 52.

³ *Hairston v. Jaudon*, 42 Miss., 380.

⁴ *Crane v. De Camp*, 21 N. J. Eq., 414. A. obtained judgment against a county, and on an execution upon the judgment, purchased a number of town lots belonging to the county. Afterward, B. bought one of the lots at public sale, paid the purchase money, and took possession. A. died, and his heirs released their interest in the lots to the county on being repaid the purchase money; B. also agreeing to release his interest in the lot bought by him on receiving the amount he had paid. The money was tendered to B., who refused to receive it and to execute a release. The lot which B. had bought was afterward sold to C. by the county, with the knowledge and without the objection of B., and a deed given of the same. A bill filed by B. against the county to obtain legal title to the lot, was dismissed. *Jaques v. Vigo County*, 2 Blackf., 403.

⁵ *Jones v. Neale*, 2 Patton & Heath, 339.

release A. from all obligation to convey the property, and that, upon tender of the money B. had paid, A. was entitled to possession.¹ Where, on default in the payment of the purchase money, one party said to the other that there must be an end to the negotiation, to which the other assented, it was held that the contract was thereby rescinded.² So where the vendor remained in possession, and, seventeen years afterward, the representatives of the purchaser claimed interest on the debt which was the consideration for the sale, and not that they were entitled to the rents and profits of the land, it was held that the contract had been waived.³ A. purchased a lease upon the assurance of the lessor's agent that if A. made certain improvements, he should have a renewal of the lease, or a new lease for a long period upon the same terms. A. made the improvements, but accepted a lease for five years at an increased rent. It was held that the lessee was not entitled to a reformation of the lease, or to specific performance of the agreement.⁴ The land of A. having been sold on an execution issued by B., C. paid part of the judgment debt, under an agreement with B. that, upon the payment of a certain other sum, B. would convey the property to C. in trust for the wife and children of A. C. died without making any further payment, and B. refunded to C.'s administrator what C. had paid. It was held that the administrator had thereby rescinded the agreement of B. with C.⁵ Where a married woman in possession of land was entitled to a conveyance on the payment of six hundred dollars, and she sold her equitable right and surrendered possession to her vendor, it was held that she could not enforce the original contract, although she was incapacitated from making the second one.⁶ A. entered into a contract with B. to convey to him certain real estate, B. agreeing to pay off incumbrances, to make advances, to sell

¹ Fullerton v. Doyle, 18 Texas, 3.

² Carter v. Dean of Ely, 7 Sim., 211.

³ Earl of Rosse v. Sterling, 4 Dow., 442. And see Hill v. Gomme, 1 Beav., 540.

⁴ Ewald v. Lyons, 29 Cal., 550.

⁵ Smith v. Smith, 1 Greene, Iowa, 307.

⁶ Crane v. Crane, 81 Ill., 165.

the land during a period of three years, and to divide the proceeds with A. B. afterward agreed to convey the land to C., the latter to make the advances, to sell the land, and to pay A. his share of the proceeds. The three years having elapsed, and a suit between a committee of the estate of A. and B. and C., to set aside the original contract having been settled, it was held that it constituted an abandonment of the contract.¹ But a loose conversation will not be sufficient proof of the waiver of the contract.² The plaintiffs, having entered upon certain work under a written contract with the defendants therefor, were ordered by the latter to quit and do no more, which they immediately did. It was held that this could not be deemed a mutual abandonment of the contract, but that the defendants were liable for all the consequences of a breach of the contract on their part.³ Under an agreement to let a house for three years at a yearly rent, and, upon the request of the tenant, to give him a lease for a term from the expiration of the three years' occupancy at the same rent, the tenant stipulating to make all repairs, it was held that the tenant, who remained in possession, had a right, four years after the expiration of the three years' occupancy, to have the agreement specifically performed, and that neither an application made by him two years previous for a lease at a reduced rent which was refused, nor an application to be allowed for what he had expended in repairs, constituted a waiver of his rights.⁴ It has been said that "the court requires as clear evidence of waiver, as of the existence, of the contract itself, and will

¹ Mann v. Palmer, 3 N. Y. Ct. of App. Decis., 162. A contract between the plaintiffs and the water commissioners of the city of New York provided that the plaintiffs should construct a certain portion of the Croton aqueduct according to specifications, and that they should make such alterations in the work as might be directed in writing by the water commissioners, or their chief engineer. The water commissioners having stopped the work for the ostensible purpose of changing its form and dimensions without giving to the plaintiffs any written notice for such change, it was held to constitute a rescission of the contract on the part of the former. Clark v. Mayor of New York, 3 Barb., 288.

² Moore v. Crofton, 3 Jon. & Lat., 438, 445. ³ Derby v. Johnson, 21 Vt., 17.

⁴ Moss v. Barton, L. R. 1, Eq. 474.

not act upon less.”¹ Application for a rescission by mutual consent, is not a rescission, nor does it imply any breach or abandonment of the contract on the part of the applicant.²

§ 494. *Who to rescind.*—It must be shown that the contract was abandoned by both parties.³ It cannot be rescinded as to one, and remain in force as to the other.⁴ But it sometimes occurs that a contract may be specifically enforced against a party who has himself forfeited his right to insist upon it.⁵ So the court may refuse to enforce an agreement which yet cannot be regarded as rescinded.⁶

§ 495. *Right to rescind contract.*—When it is stipulated that, upon the happening of a certain event, the agreement shall be void, and the event occurs, the contract may be

¹ Lord St. Leonards in *Carolan v. Brabazon*, 3 Jon. & Lat., 200, 209; *Dial v. Crane*, 10 Texas, 444.

² *Picot v. Douglass*, 46 Mo., 497.

³ *Fitt v. Cassanet*, 4 M. & G., 898; *Franklin v. Miller*, 4 A. & E., 599. A mere contract of agency is of course governed by different principles. A person was employed by a railroad company to obtain donations and right of way for an extension of the road, and to be allowed for his services two-fifths in value of the donations procured, and his actual cash expenses. It was held that the contract might be revoked by the company whenever it saw fit. The court said: “We can regard the relations between the defendant and plaintiff, created by the instrument, in no other light than that of principal and agent. It is a familiar principle of law, that an agency is revocable at the will of the principal, unless the power conferred on the agent be given for a valuable consideration, or as a security, or is coupled with an interest. It is not claimed that the authority conferred upon the plaintiff was based upon a consideration, or was given as a security. Is it a power coupled with an interest? What was the interest of plaintiff? It was to receive a certain compensation in value and kind of the donations he should receive for defendant. His interest existed in that which should be produced by the exercise of the power conferred upon him. Now it is plain that the thing in which he had, or rather was to have, an interest, could not exist until the power was exercised. The exercise of the power was necessary to bring the thing in which he was to have an interest into existence. In each instance, where a donation was given, the power was exhausted when the donation was received. Hence, the power and the interest were not united. The interest coupled with a power which gives it an irrevocable character, must be in the thing upon which the power is exercised, and not in that which may be produced by the exercise of the power. Before the exercise of the power conferred by the instrument in question, nothing did or could exist in which plaintiff had an interest. He had a right to a part of the donations which he should procure. He had no interest in a thing, but a right to a thing when it should be created. His power, therefore, was not coupled with an interest, and was revocable at the will of the defendants.” *Smith v. Cedar Falls & Minn. R.R. Co.*, 30 Iowa, 244.

⁴ *Coolidge v. Brigham*, 1 Metc., 550. ⁵ *Price v. Assheton*, 1 Y. & C. Ex., 82.

⁶ *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Sm. & Gif., 119.

rescinded by the party thereby injured.¹ If, for instance, it be provided that if the vendor cannot show a good title, or the purchaser does not make his payment at the day agreed, the contract shall be void, the stipulation has been held to mean that in the former case the purchaser, and in the latter the vendor, may avoid the contract, and not that the contract is absolutely void.² On the sale of land, part of the purchase money was paid, and promissory notes given for the balance, the vendor at the same time giving the vendee a title bond conditioned that if the notes were not paid when they fell due, the bond should be void, and the money paid by the vendee forfeited; or if, upon payment of the notes, the vendor should execute a conveyance of the property to the vendee with warranty, the bond should be void. It was held that the purchaser might elect either to pay the notes and take the property, or to give up the contract and forfeit the money paid.³ Whenever one party to a contract refuses to execute any substantial part of his agreement, he thereby gives to the other party the option to rescind the entire contract by offering to restore what he has received, and replacing the parties in their original situation, provided the offer to do this is made in a reasonable time, and the situation of the parties remains so far unchanged that they can be restored to their first position. But the party who would take this ground, must do so distinctly and unequivocally.* A party cannot rescind if the failure of the other party be but partial, leaving a

¹ Arnoux v. Homans, 25 How., Pr., 427.

² Roberts v. Wyatt, 2 Taunt., 268. And see Hyde v. Watts, 12 M. & W., 254. The agreement may provide that advantage may be taken of the default of either party. Where it was stipulated that there need not be performance if the title were found to be defective, which proved to be the case, the vendor was permitted to rescind, for the reason that counsel were of opinion that a marketable title could not be made to an undivided third of the estate. Williams v. Edwards, 2 Sim., 78. And the same privilege was accorded to the purchaser, in a case where the vendor had no title to a small portion of the property. Ashton v. Wood, 3 Jur. N. S., 1164.

³ Peterson v. Dickey, 8 Blackf., 427.

* Webb v. Stone, 24 N. H., 282; Allen v. Webb, Ib., 278; Sumner v. Parker, 36 Ib., 449; Fay v. Oliver, 20 Vt., 118; Fletcher v. Cole, 23 Ib., 114.

distinct part as a subsisting and executed consideration, and leaving also the other party his action for damages for the part not performed. Ordinarily, a contract cannot be rescinded by one of the parties unless both can be restored to the condition in which they were before the contract was made. So that if one of the parties has obtained an advantage by a partial performance, he cannot hold this advantage and regard the contract as rescinded because of the non-performance of the residue, but must do all that the contract requires of him, and seek his remedy in damages.¹ When a party is entitled to the rescission of an agreement on the non-performance of an act which it is his duty to perform, he will not be permitted to refuse to perform the act, and, on the strength of his own neglect, to annul the contract. But he may rescind the contract, if, having done all in his power, he fails to perform the act.² On the other hand, if the right to rescind is dependent upon the inability or unwillingness of the party to do the act, he may exonerate himself by his election from any obligation to do the act.³ Where, however, a clause in a contract for sale empowers the vendor, in case the purchaser shall insist on any objection which he should be unwilling or unable to remove, to rescind such contract, there must be not only an inability or unwillingness on the part of the vendor, but an insisting on the part of the purchaser; and if the latter waives the objection, the former cannot rescind.⁴

¹ *Franklin v. Miller*, 4 Ad. & El., 599; *Beed v. Blandford*, 2 Y. & J., 278; *Hunt v. Silk*, 5 East., 449; *Burge v. Cedar Rapids & Mo. R.R. Co.*, 32 Iowa, 101.

² *Page v. Adams*, 4 Beav., 269.

³ *Tanner v. Smith*, 10 Sim., 410; *Morley v. Cooke*, 2 Hare, 106. The bringing of an action at law and the recovery of damages for breach of contract, will constitute an election by the party of his remedy. *Orme v. Broughton*, 10 Bing., 533; *Sainter v. Ferguson*, 1 Mac. & G., 286; *Buckmaster v. Grundy*, 3 Gilman, 626; *Hopkins v. Lee*, 6 Wheat., 109; *Hill v. Hobart*, 16 Me., 169; *Stuyvesant v. New York*, 11 Paige Ch., 414. But see *Pritchard v. Todd*, 38 Conn., 413.

⁴ *Duddell v. Simpson*, L. R. 1, Eq. 578. An agreement to sell a person all the timber on certain land "suitable for rafting and sawing," will, from its nature, be terminated, if the vendee does not avail himself of the right within a reasonable time after being notified to do so. *Boults v. Mitchell*, 15 Pa. St., 371.

§ 496. *Right of rescission to be exercised promptly.*—A party seeking to rescind a contract must make his application without delay, and come to his election as soon as the cause for rescission is discovered, so that the parties may be placed as nearly *in statu quo* as possible.¹ If he has been deceived, he must, upon the discovery of the fraud, elect to rescind, or to treat the transaction as a contract.² Where the conditions of sale provide that, in case of any objection which the vendor is unable or unwilling to remove, he may rescind the contract and the purchaser have his deposit without interest or costs, it has been held that the objection must be such as is taken soon after it is ascertained, and that a negotiation between the parties for the completion of the purchase, being evidence of the vendor's willingness to remove the objection, would constitute a waiver of the condition.³ So, where money is payable by instalments, a party must avail himself of the right to rescind, on breach of the contract, without delay; and if he receives money due on a subsequent instalment, he thereby waives the right to rescind for default in a previous payment.⁴

§ 497. *Waiver of right.*—Where there is an agreement to rescind at a future day if certain things are not done, either party may, if so disposed, waive whatever advantages he has under the agreement, and stand with the consent of the other, either express or implied, upon the terms of the original contract.⁵ If the right to rescind has been waived, it will not be revived by the mere subsequent discovery of some incident of fraud or other ground which was unknown at the time of the waiver. Where a purchaser, upon discovering fraud, did not make any objection, but afterward, upon finding other evidence of fraud, did so, it was held

¹ Tobey v. Crow, 37 Md., 51.

² Campbell v. Fleming, 1 A. & E., 40.

³ Tanner v. Smith, 10 Sim., 410; Morley v. Cook, 2 Hare, 106; M'Culloch v. Gregory, 1 K. & J., 286; Lane v. Debenham, 17 Jur., 1005. And see Cutts v. Thodey, 13 Sim., 206.

⁴ Hunter v. Daniel, 4 Hare, 420.

⁵ Echols v. Butler, 28 Miss., 114.

too late for him to rescind the contract.¹ “To entitle him to do so, he should, at the time of discovering the fraud, have elected to repudiate the whole transaction. Instead of doing so, he deals with that for which he now says that he never legally contracted. Long after this, as he alleges, he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud; and it cannot revive the right of repudiation which has been once waived.”² But where it is agreed that a party shall be entitled to rescind in respect to separate breaches, the waiver of one will not affect the party's right as to the other. Accordingly, where it was stipulated that money should be paid by instalments, and that time should be of the essence of the contract, and that the agreement might be rescinded upon breach of it, it was held that each default in the payment of an instalment at the time agreed constituted another breach of the contract on which there was a right to rescind.³

§ 498. *Compensation and rescission.*—When compensation and the right to rescind are stipulated for, the latter will in general be restricted to cases not within the condition for the former. This principle was illustrated in a case as follows: Particulars of sale, through mistake on the part of the vendor, described part of the property as a customary leasehold of a manor, renewable every twenty-one years on payment of a customary fine, when the property was in fact a leasehold for twenty-one years without the right of renewal. The fourth condition of sale provided that the vendor might at any time after the delivery of objections to the title, vacate the sale, and that the deposit should thereupon be returned without interest, costs, or other compensation. It was stipulated in the fifth condition that the purchaser should accept the existing lease and its assignment to the vendor as a sufficient title to the

¹ Campbell v. Fleming, *supra*.

² Ibid., per Patterson, J.

³ Hunter v. Daniel, *supra*.

property. The sixth condition provided that if, through any mistake, the property should be incorrectly described, or any error or misstatement be inserted, it should not vitiate the sale, but that compensation should be made by either party, as the case might be. The vice-chancellor, referring to the fifth condition as explaining the use of the word title, held that the error consisted rather in a misstatement of the subject matter of the sale, than of the vendor's title to it, and that it was therefore within the sixth, and not within the fourth, condition of sale; and he accordingly enforced specific performance with compensation.¹

¹ *Painter v. Newby*, 11 Hare, 26. And see *Nelthorpe v. Holgate*, 1 Coll., 203; *Hoy v. Smythies*, 22 Beav., 510.

BOOK IV.

MATTERS INCIDENT TO THE JURISDICTION.

CHAPTER I.

COMPENSATION AND DAMAGES.

- 499. General rule in its application to vendor or vendee.
- 500. When and how applied for.
- 501. Limitation of power of court.
- 502. When vendor may convey less than he agreed, with compensation.
- 503. Defects which may be compensated.
- 504. When purchaser not bound to accept part performance with compensation.
- 505. Right of vendee to elect to take compensation or have the contract rescinded.
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- 507. Where the loss is uncertain.
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- 509. In case of the sale of property in gross, or as containing a specified quantity.
- 510. Where full performance will injure third persons.
- 511. In case of refusal of wife to join in deed.
- 512. Where the vendor sells the land to another party.
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- 514. Power of court to award damages.
- 515. Limitation of jurisdiction of court as to damages.
- 516. Knowledge of plaintiff that contract cannot be enforced.
- 517. Where defendant has deprived himself of power to perform.
- 518. Lord Cairns' Act.
- 519. Liability of purchaser to payment of interest.
- 520. Repairs, deterioration, or accidental loss.
- 521. Right of vendee to be allowed for improvements.
- 522. In case of verbal contract partly performed.
- 523. Waiver of objection that there is a remedy at law.
- 524. Compensation how determined.
- 525. Measure of damages.

§ 499. *Under what circumstances allowed.*—Cases often occur in which complete justice cannot be done between the parties to a contract by a decree for specific performance, without allowance made to one of them for some defect in the subject matter of the contract, or for injury sus-

tained by some act or default of the other; and hence arises the salutary doctrine of compensation.¹ The plaintiff may admit his inability to perform the contract literally, and ask that it be enforced to the extent he can fulfil it, with compensation to the defendant for the failure; or the question of compensation may be raised by the defendant when the plaintiff prays for a decree without any allowance for the non-fulfilment on his part of the exact terms of the contract. Where, in the first of the cases supposed, the vendor is plaintiff, the court will be cautious in granting him the relief asked, and in enforcing performance by an unwilling purchaser; and it will not do it unless the purchaser can be placed in a condition as favorable substantially as if the contract had been fully carried out.² On the other hand, if the purchaser chooses to accept less than he contracted for, there can be no good reason why he should not compel the vendor to perform as far as he is able, with compensation for the deficiency.³ As where a

¹ The doctrine of equity is not forfeiture, but compensation (Page v. Broom, 4 Russ., 6), the principle being that if a party gets substantially what he bargains for, he must take a compensation for a deficiency in value. Dyer v. Hargrave, 10 Ves., 806. It is said that, "Lord Thurlow used to refer this doctrine of specific performance to this: That it is scarcely possible that there may not be some small mistake or inaccuracy; as that a leasehold interest represented to be for twenty-one years, may be for twenty years and nine months; some of those little circumstances that would defeat an action at law, and yet be so clearly in compensation that they ought not to prevent the execution of the contract. And at other times he used to say, that the jurisdiction of a court of equity to compel a specific performance must have been founded upon the notion of its being against conscience to take advantage of small circumstances of variation in the description of the thing contracted for, and that the principle, being once established, was gradually enlarged, till a specific performance in equity became at length a performance of anything rather than the real contract between the parties. But this language must be received with due regard to the circumstances in which it was used." Batten on Specif. Perform., 123.

² Gardiner v. Gerrish, 23 Me., 46; Henry v. Graddy, 5 B. Mon., 450; King v. Bardeau, 6 Johns Ch., 38; Winne v. Reynolds, 6 Paige Ch., 407. See Nelthorpe v. Holgate, 1 Coll. C. C., 203; Collier v. Jenkins, You., 295; Wilson v. Williams, 3 Jur. N. S., 810. Where the defence to a contract of purchase is, that the land does not lie in the locality the vendee was led to suppose, a compensation in damages may not afford adequate relief, for the reason that "the peculiar locality, soil, vicinage, advantage of markets, and the like conveniences of an estate contracted for, cannot be replaced by other land of equal value." Best v. Stow, 2 Sandf. Ch., 298.

³ Seaman v. Vawdrey, 16 Ves., 390; Dyas v. Cruise, 2 J. & L., 460; Martin v. Cotter, 3 Ib., 496; Peacock v. Penson, 11 Beav., 355; Woodbury v. Luddy, 14 Allen, 94.

tenant for life contracts for the sale of a fee;¹ or one who has only a term for years contracts in the same way;² or a person contracts for an absolute term when the interest of the vendor is defeasible;³ or it is out of the power of the vendor to convey more than a portion of the real estate he has agreed to sell.⁴ The rule as to the purchaser is, that though he cannot have a partial interest forced upon him, yet if he entered into the contract in ignorance of the vendor's incapacity to give him the whole, and chooses afterward to take as much as he can get, he has generally, though not universally, a right to insist on that, with compensation for the defect; but that the defect must be one admitting of compensation, and not a mere matter of arbitrary damages. There is nothing in the general rule of which the vendor can complain. It is his own fault if he has assumed obligations which he cannot fulfil. The vendor is not compelled to convey anything he did not agree to convey; and the vendee pays for what he gets, according to the rate established by the agreement.⁵ Where tenants in common had contracted for the sale of their estate, and one of them died, it was held that the survivors could not compel the purchaser to take their share. But the converse of the proposition was denied, and it was held that the purchaser might compel the survivors to convey their shares, although the contract could not be enforced against the heirs of the deceased.⁶ This partial perform-

¹ *Mortlock v. Buller*, 10 Ves., 315; *Barnes v. Wood*, L. R. 8, Eq. 424.

² *Wood v. Griffith*, 1 Swanst., 54.

³ *Dale v. Lister*, 16 Ves., 7.

⁴ *Pratt v. Law*, 9 Cranch, 456. In an early case, it was said that, "no one could dispute the proposition that if a man agrees to sell me an estate in fee simple, I can insist upon his giving me all the title he has. He cannot say he will give me nothing because he cannot give me all I have contracted for. If he contracts to sell a fee simple, and has only a term of one hundred years, I have a right to that term if I think fit." Lord Eldon, in *Wood v. Griffith*, 1 Wils. Ch. Cas., 44.

⁵ *Adam's Eq. P.*, 90.

⁶ *Atty. Genl. v. Day*, 1 Ves. Sen., 218. And see *Wood v. Griffith*, *supra*; *Milligan v. Cook*, 16 Ves., 1; *Waters v. Travis*, 9 Johns, 450; *Voorhees v. De Myer*, 3 Sandf. Ch., 614; 2 Barb., 37; *Erwin v. Myers*, 46 Pa. St., 96; *Napier v. Darlington*, 70 lb., 64; *Clarke v. Reins*, 12 Gratt., 98; *Jacobs v. Locke*, 2 Ired. Eq., 286; *Harbers v. Gadsden*, 6 Rich. Eq., 284; *Weatherford v. James*,

ance is somewhat incorrectly called a specific performance, when it is, in fact, the enforcement of a contract the parties did not enter into, and in which it is frequently difficult to ascertain the just price. It is easier to arrive at what will be a suitable compensation in the case of a deficiency in the quantity or quality of the land sold, than of a deficiency in the vendor's interest, where a reversioner or other person may be prejudiced by partial alienation.¹

§ 500. *Application for.*—When a partial performance of the contract is sought with compensation, the plaintiff, whether he be the vendor or the vendee, should set out in his bill the facts entitling him to such relief. This, in the case of the vendor, is indispensable, and unless the bill distinctly raises the question, it will be demurrable.² Where the sole issue raised by his bill was that a good title had been shown at the time agreed, it was held that performance would not be enforced with compensation.³ When compensation is sought by the vendee, although it is better for him to state his grounds therefor in his pleading, yet he is not obliged to do so, but may obtain compensation at any time during the investigation before performance, though the prayer of his bill and the decree rendered at the hearing do not allude to compensation.⁴ Where, pending a

2 Ala., 170. In *Hill v. Buckley*, 17 Ves., 394, the master of the rolls said, that "where a misrepresentation is made as to quantity, though innocently, the purchaser is entitled to have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation." And see, to the same effect, *Graham v. Oliver*, 3 Beav., 124; *Wheatly v. Slade*, 4 Sim., 126; *Nelthorpe v. Holgate*, 1 Coll. C. C., 203.

¹ *Graham v. Oliver*, 1 Keen, 748, *note*; *Harbers v. Gadsden*, 6 Rich. Eq., 284.

² *Bowyer v. Bright*, 13 Price, 698.

³ *Ashton v. Wood*, 3 Jur. N. S., 1164; S. C., 3 Sm. & Gif., 436.

⁴ *Wilson v. Williams*, 3 Jur. N. S., 810. The claim for compensation, in a suit for specific performance, pertains to the cause of action, and, whether presented by the pleadings or not, is determined by the decree, which will be a bar to a subsequent action in relation to the same matter. *Thompson v. Myrick*, 24 Minn., 4. But if the vendor has no title to the property, which is known to the vendee when he files his bill, and he neglects to allege the fact, the court will refuse to give him compensation. "For if the facts which were then known to him had been fully stated in his bill, the defendant might have demurred, upon the ground that the complainant's remedy, if any he had, was at law, and not in equity." *Walworth, Ch.*, in *Morss v. Elmendorf*, 11 Paige Ch., 277. See *post*, § 506.

suit for the specific performance of a contract to grant a license to work a stone quarry, some of the stone had been taken away, compensation was obtained by a supplemental bill.¹ The purchaser will be entitled to compensation at any time before the execution of the conveyance and the payment of the whole purchase money as to a matter which has previously arisen either before or after the contract.² Thus, where real estate was sold as exempt from the payment of tithes, and, after a claim had been raised by the incumbent of the parish, the conveyance executed, and a portion of the purchase money reserved as an indemnity against this claim, it appeared that the claim was unfounded, but that the land was subject to tithe to the incumbent of another parish, it was held, on a bill filed by the purchaser, that he was entitled to compensation out of the fund.³ And compensation has been allowed for deterioration of the property between the time the contract ought to have been fulfilled on the part of the vendor, and the time when he in fact fulfils.⁴ But after the contract has been performed on

¹ *Nelson v. Bridges*, 2 Beav., 239. In this case Lord Langdale said: "It has already been declared that the plaintiff is entitled to a specific performance of the agreement. But, pending the proceedings, the very subject of the agreement, to which the plaintiff has by the decree been declared entitled, has been abstracted. The stone, or a quantity of the stone, which the plaintiff had obtained a license to quarry, has actually been taken away by the defendant Wordsworth; so that, while the performance of the agreement has been resisted and delayed by the defendants, they, or one of them at least, has taken away a portion of the subject matter of the suit, and the plaintiff has been thereby forever deprived of the full benefit of the contract. If that circumstance had been known at the first hearing, I cannot have the least doubt but that the court would, in the exercise of its jurisdiction, have put in a due course of investigation the question of the amount of compensation which ought to be made to the plaintiff. This matter, it appears, was not brought to the attention of the court at that time, and a supplemental bill is now filed by the plaintiff for the purpose of obtaining compensation. It is said that such compensation might originally have been had at law, or if not, that at least it might have been obtained at law by perfecting the decree for the specific performance of the agreement in some particular form. I am of opinion that it is not necessary for this court, when it has once entertained jurisdiction in a case, to resort to that circuitous mode of giving relief. I think, moreover, that if this matter had been before the court at the first hearing, it would have been put in a proper train of investigation. Under these circumstances, therefore, it appears to me that the plaintiff is now entitled to relief."

² *Frank v. Basnett*, 2 My. & K., 618; *Cator v. Earl of Pembroke*, 1 Bro. C. C., 301; *Prothero v. Phelps*, 25 L. J. Ch., 105; *Cann v. Cann*, 3 Sim., 447.

³ *Crompton v. Lord Melbourne*, 5 Sim., 353.

⁴ *Binks v. Lord Rokeby*, 2 Swanst., 222; *Foster v. Deacon*, 3 Mad., 394.

both sides, the court has no power to enforce compensation.¹

§ 501. *Court no power to change terms of contract.*—At law, the vendor cannot recover part of the purchase money if unable to give a title to the whole property; nor can a purchaser insist on paying only a part where there is a partial failure in the sale.² So, a court of equity, in decreeing specific performance, cannot, as a rule, compel the defendant to take less, or give more, than the amount fixed by the contract.³ A. entered into a contract with B. and C., to sell them certain land at a price to be determined by referees to be chosen by the parties, and to be paid for in merchandise. The merchandise was duly delivered to A., and the land valued. But, objections having been made to the title, B. and C. brought an action at law on the contract for the value of the merchandise, and recovered. A. thereupon filed a bill for specific performance of the contract, which was decreed upon the terms of a reduction of the price of the goods delivered thirty-three and a third per cent., and the same in the price of the land, the balance to be paid in cash. Held error, the court having no power to reduce the price of the merchandise, although it might decree specific performance at the request of A., upon the terms of an abatement in the price of the land.⁴

§ 502. *When strict fulfilment excused.*—A vendor may, however, notwithstanding he cannot convey strictly according to his contract, be held entitled to a decree compelling the purchaser to fulfil on his part. If it is out of the vendor's power, from any cause not involving bad faith, to convey each and every parcel of the land contracted to be sold, and it is evident that the part which cannot be conveyed is of small importance, or is immaterial to the purchaser's en-

Newham v. May, 13 Price, 749.

² Johnson v. Johnson, 3 Bos. & Pull., 162; Parham v. Randolph, 4 How. Miss., 435.

³ M'Kean v. Read Litt. Sel. Cas., 395; Bryan v. Read, 1 Dev. & Batt., 78; Reed v. Noe, 9 Yerg., 283. See *post*, §§ 502, 503, 504, 505, 506, 510.

⁴ Courcier v. Graham, 2 Ohio, 341. See *ante*, § 430.

joyment of that which may be conveyed to him, the vendor may insist on performance with compensation to the purchaser, or a proportionate abatement from the agreed price, if that has not been paid. But this cannot be done when the part with reference to which the defect exists is a considerable portion of the entire subject matter, or is in its nature material to the enjoyment of the part in which there is no defect, or property is contracted for which has for the purchaser a peculiar value not capable of pecuniary compensation.¹ When the possession of particular parts of the land sold may fairly be deemed the inducement of the contract, as in the case of buildings, valuable meadows, or orchards situated on a portion of the land, the incapacity of the vendor to make a good title to such portion, would afford a strong ground to vacate the whole agreement. This, however, would not be the case, when the property sold consisted of separate lots in a city, sold at different rates. If a title could not be made to some of the lots, the purchaser would only be entitled to an allowance for the deficiency, and the vendor would be compelled to convey the rest of the property upon being paid the balance of the

¹ *Magennis v. Fallon*, 2 Moll., 561; *Foley v. Crow*, 37 Md., 51; *Shaw v. Vincent*, 64 N. C., 699. "There is great difficulty in applying the doctrine of compensation to a reluctant purchaser. There is no standard by which to ascertain what is essential to a purchaser. The motives for purchasing real property are very different in different persons. Tastes, opinions, and ages create different views. Some particularly, some whim may have induced him to purchase." What is desirable to one is not so to another. One wants a wood for game, another dislikes tithes. It therefore seems a little arbitrary to insist on a party taking compensation. Why am I bound to take what I did not mean to buy? You say you will give me compensation. But who is to judge of the compensation? Can you be sure it is a compensation? It is a difficult thing for a master to ascertain what is essential to the enjoyment of the estate, and what is a proper compensation. It is as difficult for the court to decide, if, having all the data before it, it decides, as it is then proper to do, without sending it to the master. Are you to look at the land in its present state, or to consider in what state it may be in future? It is said a purchaser should communicate his motives for purchasing. If so, the vendor might enhance the price. It is also said that the defendant's objection that these twelve acres are essential was an after thought. Suppose it was. Is a court of equity to say no advantage can be taken of the objection? Though a purchaser may not at first be aware of the essentiality of the land to which no title can be made, yet, if he afterward finds it is essential, is a court of equity to say he shall not avail himself of the objection?" Sir Thomas Plumer, V. C., in *Knatchbull v. Grueber*, 1 Mad., 153.

purchase money after the proper reduction, unless each lot was essential to the enjoyment of all the others.¹

§ 503. *Enforcement of contract with compensation.*—It is not easy to lay down any definite rule as to what defects are proper subjects of compensation. A purchaser, as already stated, will be compelled to accept performance with compensation, notwithstanding a small deficiency in the subject of the sale, as : six acres from a large tract of land ;² or fourteen acres sold as water meadow, when only twelve acres answer the description ;³ or property described, on a purchase by the tenant in possession, as forty-six feet in depth, afterward ascertained to be but thirty-three feet deep ;⁴ or land sold at auction as containing nearly two acres, when there is in fact but one acre and twelve rods.⁵ Where real

¹ Poole v. Shergold, 2 Bro. C. C., 118 ; Van Eps v. Schenectady, 12 John., 436 ; Stoddart v. Smith, 5 Binney, 355. In Prendergast v. Eyre, 2 Hogan, 81, the court said that, though the principle of compensation had in some instances, in relation to some fragments or small parts of an estate sold or of rights connected with it, been applied against an unwilling purchaser, yet that the principle ought not to be extended to new classes of cases ; that there was no case of the sale of two distinct pieces of property for one entire sum, in which the court had undertaken, upon a failure of title to one of them, to compel the purchaser to take the other with compensation without regard to his wishes or estimate of relative value ; and that to do so, would be inconsistent with the principles upon which the court professed to exercise jurisdiction in specific performance.

² M'Queen v. Farquhar, 11 Ves., 467. ³ Scott v. Hanson, 1 R. & My., 128.

⁴ King v. Wilson, 6 Beav., 124.

⁵ Foley v. McKeown, 4 Leigh, 627. "It is now settled that whenever it is possible to compensate the purchaser for any article which diminishes the value of the subject matter, he must be satisfied with such compensation." Thurlow, L. C., in Howland v. Norris, 1 Cox, 61. To entitle a party to compensation the defect complained of must be, 1st, such that it can be made the subject of compensation or of recompense in damages ; 2d, it must be a case in which the court is satisfied that the purchaser would not have declined the contract had he known of the defect at the time of the purchase. Beyer v. Marks, 2 Sweeny, 715. In this case, Spencer, J., in delivering the opinion of the New York superior court, laid down the following as well established : "1st, a purchaser may insist upon a good, valid, and unincumbered title ; 2d, he is entitled to receive substantially from his vendor all the property for which he contracted ; 3d, if he obtains such a title, and, by the conveyance offered, obtains substantially the property for which he contracted, a court of equity will enforce performance on his part, otherwise not. These general rules are not, in my opinion, modified or affected by those relating to compensation, which the court will enforce, in all proper cases, in favor of the purchaser against the vendor when specific performance has been or shall be decreed ; as, for instance, in the case of a slight or immaterial deficiency in the estate, a variance of description, or an incumbrance affecting the title. The doctrine of compensation, as a rule in equity, follows these and like cases, in order to pay the purchaser for those slight de-

estate was sold as "containing by estimation forty-one acres, be the same more or less," and it was subsequently found to contain but thirty-five acres, it was held that the purchaser was not entitled to an abatement for the deficiency; the estimation not importing exactness.¹ The vendee will, in general, be compelled to complete with compensation for the defective condition of buildings, or of the land in point of cultivation as compared with the description.² And the same will be done when the vendor is not able to give possession, and the property, pending a suit for specific performance, deteriorates.³ So, an overstatement of the annual rents of property, or of the amount of business done, and income derived from it, may be the subject of compensation.⁴ When a purchaser cannot get a title to all he contracted for, if he can get the substantial inducement to the purchase, he may be compelled to accept so much as the vendor can give a good title for, with compensation; or, in case the title is defective in a small matter, perhaps a purchaser might be compelled to accept the title with an indemnity against the defect.⁵ Where a tract of one hundred and eighty-six acres was sold as freehold, and two acres were leasehold, it was held that the purchaser must take the estate with compensation.⁶ And in the case of a contract for a term of ninety-nine years which was afterward found to be two or three years less

facts that in equity he may be entitled to, if in equity he should be compelled to fulfil the contract of purchase; and in such cases compensation follows as a matter of right, and, as I hold, must be provided for in the decree."

¹ *Winch v. Winchester*, 1 V. & B., 375.

² *Dyer v. Hargrave*, 10 Ves., 505; *Grant v. Munt, Cooper*, 173. It will be no objection to a specific performance that the conveyance will not have the operation the purchaser supposed it would. *Mildmay v. Hungerford*, 2 Vern., 243; *Price v. Dyer*, 17 Ves., 356.

³ *Ferguson v. Tadman*, 1 Sim., 530; *Lord v. Stevens*, 1 Y. & C. Ex., 222; *Foster v. Deacon*, 3 Mad., 394; *Phillips v. Silvester*, L. R. 8, Ch. 173.

⁴ *Cann v. Cann*, 3 Sim., 447; *Powell v. Elliot*, L. R. 10, Ch. 424. See *Hepburn v. Auld*, 5 Cranch, 262; *King v. Bardeau*, 6 Johns Ch., 38; *Harbers v. Gadsden*, 6 Rich. Eq., 284; *Stockton v. Union Oil Co.*, 4 West Va., 273; *Lee v. Howe*, 27 Mo., 521; *Bell v. Thompson*, 34 Ala., 633; *Smith v. Fly*, 24 Texas, 345; *Morss v. Elmendorf*, 11 Paige Ch., 277; *Scott v. Bilgerry*, 40 Miss., 119.

⁵ *Evans v. Kingsberry*, 2 Rand, 120.

⁶ *Calcraft v. Roebuck*, 1 Ves., 221.

than that, the purchaser was compelled to take the property.¹ Charges and incumbrances upon the estate will be subjects for compensation. Two lots, numbered 42 and 43, were sold together at auction. There were two buildings on lot 42, one in front and the other in the rear, both of which projected about twenty inches upon lot 43. The lots were sold free of all incumbrances, except a lease of lot 42, which lease provided for the disposal of the buildings at its termination. The terms of sale described the buildings as situated on lot No. 42. The purchaser insisted that this variation in the condition of the lots ought to vacate the sale. Chancellor Kent held that the objection was insufficient to justify the purchaser in abandoning his contract. But, as it might diminish the value of the purchase below what it would have been worth if the projection had not existed, he directed a reference to ascertain the amount of such diminution, if any.² Where, upon the sale of one hundred and forty acres of land, it was stated that thirty-two acres were tithe free, and it turned out otherwise, it was held to be a proper case for compensation.³ So of a fixed annual payment charged upon land in lieu of tithe;⁴ and rent charges of a small amount.⁵ The reservation of a merely nominal rent would not be such an objection to the title as would justify a court in refusing a specific performance, even where the defendant had contracted to purchase without any notice that such nominal rent was reserved.⁶ Equity will compel a vendee to take a title subject to a pecuniary charge against which there is adequate security.⁷ In case of a mortgage on the land for a small sum compared with the value of the property, which sum, with interest to the day of the maturity of the mortgage,

¹ *Mortlock v. Buller*, 10 Ves., 306; *Halsey v. Grant*, 13 Ib., 77.

² *King v. Bardeau*, *supra*.

³ *Binks v. Lord Rokeby*, 2 Swanst., 222.

⁴ *Howland v. Norris*, 1 Cox, 59. ⁵ *Esdaile v. Stephenson*, 1 Sim. & Stu., 122.

⁶ *Ten Broeck v. Livingston*, 1 Johns Ch., 356; *Winne v. Reynolds*, 6 Ib., 407.

⁷ *Halsey v. Grant*, 13 Ves., 75; *Horniblow v. Shirley*, Ib., 181; *Fildes v. Hooker*, 3 Mad., 193; *Thompson v. Carpenter*, 4 Pa. St., 132.

the vendor offers to deduct from the purchase money, there is no ground for the vendee's refusal to perform.¹ Where a vendee sought to recover money paid on the contract of purchase, claiming that the vendor was unable to fulfil on his part, by reason of an undischarged lien for taxes, and it appeared that the balance of the purchase money remaining due was much larger than was required to relieve the land of this lien, it was held that the action could not be maintained.² Land having been sold free of incumbrances, the vendee, after taking possession, making valuable improvements, and paying a portion of the price, ascertained that there were mortgages on the land, and the vendor declared a forfeiture and recovered in ejectment. It was decreed, on a bill filed by the vendee to enjoin the further prosecution of the proceedings in ejectment, that the vendee should pay the balance of the purchase money, less the amount of the incumbrances, and the vendor execute a conveyance with the covenants stipulated in the contract.³

§ 504. *Material defects not subjects for compensation.*—When the deficiency is essential to the enjoyment of the residue, specific performance will not be enforced against the purchaser.⁴ As to this, each case must of course be governed by its own circumstances. There is no principle of equity more artificial than that which goes to determine whether the part to which no title can be made is material, and whether the purchaser shall be required to take the remainder with any and what compensation for the want of title to the defective part. Where a wharf and jetty were sold, the purchaser was not compelled to take the wharf without the jetty, the latter being essential to the use of the former.⁵ The same was held in the case of a house sold, the vendor failing to make out title to a small strip of land between the house and the highway;⁶ also where a

¹ Guynet v. Mantel, 4 Duer, 86. See Tiernan v. Roland, 15 Pa. St., 429.

² Marsh v. Wyckoff, 10 Bosw., 202.

³ Wallace v. McLaughlin, 57 Ill., 53. See Hinckley v. Smith, 51 N. Y., 21.

⁴ Howard v. Kimball, 65 N. C., 175.

⁵ Piers v. Lambert, 7 Beav., 546.

⁶ Perkins v. Ede, 16 Beav., 193.

yard, belonging to the premises contracted for, was held from year to year, instead of for the same term of years as the rest of the property.¹ A court of equity will not lend its aid to compel a purchaser to take a conveyance which does not transfer such a title as he supposed he was contracting for when he entered into the agreement; unless there is something in the case to show that it was the understanding of the parties that he was to run the risk as to the validity of the vendor's title. In a suit for specific performance, it appeared that to give relief on the principle of compensation would exempt from the conveyance a homestead right embracing the dwelling-house, and leave the balance of the premises subject to the contingent right of dower of the defendant's wife. This would necessarily exclude from the conveyance a very material part of the subject matter of the contract, and almost certainly result in great pecuniary injury to all parties interested. The adjustment of compensation would be difficult in such a case, and especially that part of it founded on the contingent dower right. The interest of the defendant's wife would also be exposed to some detriment by partial alienation. It was held that these considerations taken together were sufficient to show that the court ought not to compel a conveyance with compensation.² Where a contract of sale embraced six hundred and eighty-six acres of land for cultivation, and the title to two hundred and nine acres of it was ascertained to be defective, the vendee was not compelled to take the residue, although it was separated from the other portion by a public highway.³ In one case the court thought that a defect in the title of eleven acres out of seventy "would probably be material to the suit."⁴ A

¹ *Dobell v. Hutchinson*, 3 A. & E., 355. ² *Phillips v. Stauch*, 20 Mich., 369.

³ *Jackson v. Ligon*, 3 Leigh, 161. Whether where under a contract for the sale of several lots the title of one of them is defective, specific performance will be decreed as to the rest, will, of course, depend upon the circumstances of the case. *Casamajor v. Strode*, 2 My. & K., 722.

⁴ *Lord Eldon in Osbaldiston v. Askew*, 2 J. & W., 539.

brewer, who contracted for the purchase of a public house for the purpose of his business, was held not obliged to take it subject to a lease having eight years yet to run, although it had been described as occupied by a tenant.¹ Where it is stipulated in a contract for the sale of a house, that it shall be vacated by a person in possession by the day fixed for the payment of the purchase money, if the tenant unlawfully remain in possession subsequent to that day, the vendor cannot compel specific performance.² When easements are exercisable over the land, the purchaser will not in general be compelled to take it with compensation; as a public right of way across land sold for building purposes;³ or the right to draw water, from a large portion of the land sold, in water-courses for the use of the adjoining premises.* The existence of a right of entry on the land contracted to be sold, which would be likely to interfere with the enjoyment of the property, will deprive the vendor of the right to compel specific performance.⁶ Where a lease is sold the purchaser cannot be compelled to take a substantially shorter term than that contracted for;⁷ nor an under-lease, instead of an original lease;⁸ nor a new lease, where the contract is for the assignment of a subsisting lease;⁹ nor an undivided interest in land, instead of an entirety;¹⁰ nor a reversion expectant on a life estate, instead of an estate in possession.¹⁰ Where a contract for a leasehold house stated that by the lease

¹ Caballero v. Henty, L. R. 9, Ch. 447.

² Howe v. Conley, 16 Gray, 552.

³ Dykes v. Blake, 4 Bing. N. C., 463.

⁴ Shackleton v. Sutcliffe, 1 De G. & Sm., 609. In this case it was held that the defect was not the subject of compensation, notwithstanding a condition that a mistake in the description or an error in the particulars should not annul the contract.

⁵ Burnell v. Brown, 1 Jac. & W., 172; Larkin v. Lord Rosse, 10 Ir. Eq., 70.

⁶ Belworth v. Hassell, 4 Camp, 140; Long v. Fletcher, 2 Eq. Cas. Abr., 5; Forrer v. Nash, 35 Beav., 167.

⁷ Madeley v. Booth, 2 De G. & S., 718.

⁸ Mason v. Corder, 2 Marsh, 332.

* Atty. Genl. v. Day, 1 Ves. Sen., 218; Dalby v. Pullen, 3 Sim., 29, Affd. 1 R. & M., 296; Roffey v. Shollcross, 4 Mad., 227.

¹⁰ Collier v. Jenkins, Younge, 295; Hughes v. Jones, 8 Jur. N. S., 399.

no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper, or working hatter, and it was provided that there should be compensation in case of error or misstatement, and the lease in fact prohibited the doing of a great many other things besides those mentioned, including the sale of any provisions, the purchaser was held entitled to rescind the contract.¹ The purchaser cannot be compelled to take property, which, owing to acts of the vendor in felling timber, pulling down buildings, or otherwise, is materially changed from the condition it was in when the contract was executed.² The whole of the premises contracted for may be essential to the object of the purchase, for the reason that if a portion were not conveyed, it might be used in a manner prejudicial to the value and enjoyment of the residue; as where land near a mansion is capable of being turned to profitable account in making brick, and of being thereby converted into a nuisance.³ But the apprehended injury must be probable, and not merely speculative and conjectural.⁴

§ 505. *Right of purchaser to accept a partial fulfilment.*—The vendee may, in many cases, insist upon a part performance of an agreement which the vendor cannot fully perform, with compensation for the residue.⁵ The vendor is not required to remain passive until the vendee determines which course he will pursue. He may file a bill in equity for the purpose of putting the vendee to his election, and, if he refuses to accept a title, to compel him to abandon the contract and restore the possession.⁶ Where

¹ *Flight v. Booth*, 1 Bing. N. C., 370.

² *Duke of St. Albans v. Shore*, 1 H. Bl., 271; *Granger v. Worms*, 4 Camp, 83.

³ *Knatchbull v. Grueber*, 1 Mad., 153.

⁴ *Ibid.*

⁵ *Barnes v. Wood*, L. R. 8, Eq. 421; *Jones v. Shackelford*, 2 Bibb., 410; *Bass v. Gilliland*, 5 Ala., 759; *Mathews v. Patterson*, 2 How. Miss., 729; *Wright v. Young*, 6 Wis., 127; *McConnell v. Brillhart*, 17 Ill., 354; *Collins v. Smith*, 1 Head, Tenn., 251; *Harding v. Parshall*, 56 Ill., 219; *Wilson v. Cox*, 50 Miss., 133. Where the contract, as to a portion of the land agreed to be conveyed, is uncertain, such portion cannot be rejected and the contract be enforced as to the residue with compensation, when the residue and compensation can only be shown by parol. *King v. Ruckman*, 20 N. J. Eq., 317.

⁶ *Davison v. Perrine*, 22 N. J. Eq., 87.

the vendor contracted to sell land of which, as it afterward appeared, he only owned the undivided half, and he brought an action against the vendee to recover the possession, or to enforce the payment of the purchase money, it was held that the defendant might elect to take the half upon payment of one-half of the purchase money, or to have the contract rescinded upon repayment by the plaintiff of what he had received, with compensation for the defendant's improvements; and that if waste had been committed by the defendant, the plaintiff was entitled to recover the damages caused to the property thereby.¹ A. executed to B. a bond for the conveyance of certain lots on payment of the first instalment of the purchase money. Before the bond was executed the agent of A. had sold, without A.'s knowledge, one of the lots. On a bill for specific performance, it was held that B. might take a deed of the lots to which a title could be made, with compensation, or have the contract rescinded; that B., if he elected the former, was entitled to a relinquishment of dower in the lots conveyed, and, in case of refusal on the part of the wife, to an abatement from the purchase money therefor.² The plaintiff offered to take a lease of a farm belonging to the defendant at a rent of five hundred pounds per annum, specifying in his offer the inclosures he desired to take, with their number of acres, amounting in the whole to two hundred and forty-nine acres. The defendant's agent wished to let only two hundred and fourteen acres with this farm; but he accepted the plaintiff's proposition without ascertaining the number of acres included in it. He

¹ Erwin v. Myers, 46 Pa. St., 96.

² Wingate v. Hamilton, 7 Ind., 73. Where an ante-nuptial agreement provided that certain property should be irrevocably devoted to the wife's use at times specifically designated, so as to guard it against accidents to her husband's fortune, it was held too late to attempt to create the fund after her husband's death, and when her legal right to a share in his estate had become vested; that, although she could then receive the whole amount to which she would have been entitled if the contract had been performed, yet it was for her to elect whether or not she would accept performance. Sullings v. Sullings, 9 Allen, 254.

had in fact let one of the inclosures to another person. A previous offer had been made by a former tenant for the same farm as containing two hundred and thirty-five acres, and the defendant's agent admitted that he thought the plaintiff's offer was for the same quantity of land as the former tenant's. The plaintiff, in a suit for specific performance, having stated his willingness to take a lease of the two hundred and fourteen acres at a proportionately reduced rent, it was held that the defendant must give the plaintiff a lease of two hundred and fourteen acres at a rent reduced from five hundred pounds in the proportion of two hundred and fourteen to two hundred and thirty-five.¹

§ 506. *Where the purchaser knew or might have known of defects.*—The right of the vendee, however, to elect whether or not he will accept a partial performance, is subject to an important qualification. When the vendee knew, at the time of entering into the contract, that the vendor had a title to only a part of the land he agreed to convey, and there is no special ground entitling the vendee to equitable relief, a court of equity will not decree compensation, but will leave him to his legal remedy, it being presumed, in such a case, that the sale was meant by the parties to include only such an interest in the property as the vendor possessed.² For the same reason, if the vendee, at the time of contracting for the purchase, knows of a defect in the description, he will not be entitled to compensation therefor.³ But the vendee will not be required to have knowledge of any substantial matter of which the vendor is bound to inform him. Where premises sold were described as forty-six feet deep, and the depth was in fact only thirty-three feet, it was held that the vendee was entitled to an

¹ McKenzie v. Hesketh, L. R. 7, Ch. D. 675.

² Castle v. Wilkinson, L. R. 5, Ch. 534; Lawrenson v. Butler, 1 Sch. & Lef., 13; Nelthorpe v. Holgate, 1 Coll., 203; Peeler v. Levy, 26 N. J. Eq., 330. See *ante*, § 206. Cases in which the vendee knows, when he enters into the contract, that the vendor does not own any portion of the property, are governed by a different principle, and will be considered hereafter.

³ Dyer v. Hargrave, 10 Ves., 505.

abatement, although he was in possession as tenant at the time of the purchase; because he would not necessarily know the exact measurement, and might have relied on the representation.¹ Although the vendee knew, when he entered into the contract, that the vendor's title was defective, yet if it was agreed between the parties that the vendor should make a good title by a certain day, the vendee's previous knowledge of defects in the title, is not a reason for compelling him to take such title as the vendor can convey.² The neglect of the purchaser to make inquiry, may have the same effect on his rights as actual notice. Where, when he entered into the contract, he knew that a tenant was in possession, and did not inquire as to the nature and extent of the tenant's interest, it was held that he was not entitled to an abatement on the ground that the property was subject to a lease.³ Where a house was stated to be a residence fit for a respectable family, the court said that the purchaser might have seen the house and judged for himself, and he had no reason to complain, when ordinary diligence would have enabled him to know certainly.⁴ So, compensation will not be allowed for defects which are open to common observation; as where a farm which the purchaser had himself inspected, was described as lying within a ring fence, when it did not in fact so lie.⁵ But defects, to be within the rule, must be patent to everybody. Therefore the court gave compensation for dry rot in a house, which was not easily discoverable.⁶ When the defect is a

¹ King v. Wilson, 6 Beav., 124.

² Jackson v. Ligon, 3 Leigh, 161. In this case, Tucker, J., said: "If, in the present case, the purchaser will be concluded from objecting to the title, by the fact of his prior knowledge of its defects, it is not perceived what course a buyer is to take who desires to secure himself against known defects. The case of Stockton v. Cook, 3 Munf., 68, very clearly shows the understanding of the court that a covenant against incumbrances comprehends known as well as unknown incumbrances, and that the vendee is not precluded by his previous knowledge from claiming the fulfilment of the covenant. Were it otherwise, it would be impossible for him to provide for his security."

³ James v. Lichfield, L. R. 9, Eq. 51. *Contra*, Caballero v. Henty, L. R. 9, Ch. 447.

⁴ Magennis v. Fallon, 2 Moll., 561.

⁵ Dyer v. Hargrave, 10 Ves., 505.

⁶ Grant v. Munt, Cooper, 173.

surprise to both parties, and compensation cannot be allowed without doing injustice to the vendor, the vendee will be called upon to elect either to perform, or abandon the contract.¹

§ 507. *Where loss is incapable of ascertainment or contingent.*—Although compensation will be allowed, notwithstanding the just amount, owing to the absence of data, cannot be ascertained with absolute certainty, but only the judgment of competent persons;² yet compensation will sometimes be refused for the reason that there is no means of arriving at a reasonable estimate of it; as where, before completion, ornamental trees are cut down, affecting the value of the property as a residence.³ When the loss is not certain, but contingent, indemnity, which is a species of compensation, may be required; and the vendee may sometimes elect to have an indemnity, where the vendor could not compel the purchaser to accept it; as against a widow's dower,⁴ or against a material incumbrance,⁵ or in case of a misdescription,⁶ or as to a contingency which endangers the entire subject matter of the contract.⁷

§ 508. *Agreement that there shall be no allowance for defects.*—The right to compensation may be cut off by a provision in the contract that errors or defects shall not be the subject of compensation; but not if the error or defect is such as to materially change the contract intended.⁸ At an auction sale of real estate, after a general description of the property in the particulars, there was added, in much

¹ Durham v. Legard, 34 L. J. N. S. Ch., 589.

² Ramsden v. Hirst, 4 Jur. N. S., 200.

³ Magennis v. Fallon, *supra*. And see Lord Brooke v. Rounthwaite, 5 Hare, 298; *ante*, § 204.

⁴ Wilson v. Williams, 3 Jur. N. S., 810.

⁵ Wood v. Bernal, 19 Ves., 220.

⁶ Ridgway v. Gray, 1 M'N. & G., 109.

⁷ Fildes v. Hooker, 3 Mad., 193. See Belmanno v. Lumley, 1 V. & B., 224; Paton v. Brebner, 1 Bligh, 66; Aylett v. Ashton, 1 My. & Cr., 105; Milligan v. Cooke, 16 Ves., 1; Patterson v. Long, 6 Beav., 598; Nouaille v. Flight, 7 Ib., 521; Walker v. Barnes, 3 Mad., 247; Ridgway v. Gray, 1 Mac. & G., 109; Bainbridge v. Kinnaird, 32 Beav., 346; Lounsbury v. Locander, 25 N. J. Eq., 555.

⁸ Flight v. Booth, 1 Bing. N. C., 370; Painter v. Newby, 11 Hare, 26.

smaller type, the following: "The site of the said messuages or tenements and outbuildings, contains 753 square yards, or thereabouts." The estate in fact contained only 573 square yards. A condition of sale provided that "if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendor or purchaser in respect thereof." It was held that the conditions must be construed as intended to cover small unintentional errors and inaccuracies, and not reckless and careless statements, and that so large a deficiency as 180 square yards, entitled the purchaser to compensation.¹

§ 509. *Right to compensation affected by nature of sale.*—Where a contract of sale of real estate is entire, for a gross sum, and there is a failure of title to a portion of the land from a cause of which both parties were ignorant, there is no middle ground between a rescission of the whole contract, or a performance of the whole; and if the vendee declines to rescind, he must pay the whole purchase money.² If, for instance, the vendee agrees to pay a sum certain in gross for one-half of a farm by name, without mention of the quantity, reference to a plat, or any stipulation on the part of the vendor, the thing bargained for being half of a particular farm for so much money, there is no cause for a deduction for a deficiency in quantity. But it is otherwise, when the vendee makes the purchase under the belief, which he has good reason to entertain, that the farm consists of a given number of acres, and it is afterward ascertained to contain very many acres less; especially if the mistaken idea is caused by the representation of the vendor and the exhibition of a plat.³ Where the land sold was described as in-

¹ *Whittemore v. Whittemore*, L. R. 8, Eq. 603.

² *Glassell v. Thomas*, 3 Leigh, 113; *Bailey v. James*, 11 Gratt., 468; *Gillilan v. Hinckle*, 8 W. Va., 262; *Etheridge v. Vernoy*, 70 N. C., 713.

³ *Kent v. Carcaud*, 17 Md., 291. And see *Foley v. M'Keown*, 4 Leigh, 678; *Miller v. Chetwood*, 1 Green N. J. Ch., 199; *Winston v. Browning*, 61 Ala., 80. "The number or quantity of acres, after a certain description by metes and bounds, or by other known specifications, is but matter of description, and does

closed by a certain fence, and the fence in fact took in five feet of a street, which, at the time of the sale, was unknown to both parties, it was held that the vendee was entitled to an abatement from the price for the deficiency.¹ A description, however, of the land by its boundaries, or the insertion of the words "more or less," or equivalent words, in an agreement for the sale and purchase of land, will control a statement of the quantity of land, or of the length of the boundary lines, so that neither party will be entitled to relief on account of a deficiency or surplus, unless in case of so great a difference as will naturally raise the presumption of fraud or gross mistake in the very essence of the contract. A contract provided that the purchaser should pay "seven thousand dollars for wharf lot on Border Street," and further described the lot as bounded on two sides by the ship-yards of persons named, and as "measuring about two hundred and twenty feet on Border Street, more or less." It appeared that the land was a wharf lot lying between and bounded by the two ship-yards, but that it in fact measured only one hundred and seventy feet on Border Street, and that the value of the land was in proportion to the number of feet on the line of that street. It further appeared that, long before the contract, the title deeds of the property were on the public records, and showed the actual boundaries and extent of the lot; but that neither the plaintiff's agent, with whom the contract was made, nor the defendant had actual knowledge of those deeds. It was held that there was no ground for an abatement of the price.² When property is sold as containing

not amount to any covenant, though the quantity of acres should fall short of the given amount. Whenever it appears by the definite boundaries, or by words of qualification, as 'more or less,' or as 'containing by estimation,' or the like, that the statement of the quantity of acres in the deed is mere matter of description, and not of the essence of the contract, the buyer takes the risk of the quantity if there be no admixture of fraud in the case." 4 Kent's Com., 466.

¹ Brooks v. Riding, 46 Ind., 15.

² Noble v. Gookins, 99 Mass., 231, per Gray, J., who delivered the opinion of the court, which was unanimous, citing Stebbins v. Eddy, 4 Mason, 414; Marvin v. Bennett, 8 Paige Ch., 312; Morris Canal Co. v. Emmett, 9 Ib., 168;

a given number of acres, at a certain price per acre, and it contains less than the number of acres specified, the purchaser will be entitled to compensation, although the property was estimated to contain that number of acres in an old survey.¹ As, in such a case, both parties are presumed to have been influenced in their bargain by the supposed quantity, if a misrepresentation be made as to the quantity, even innocently, the purchaser may claim what the vendor is able to convey, with a deduction from the purchase money for the deficiency.* Where a tract of land was described as containing twenty-one thousand seven hundred and fifty acres, when it in fact contained but eleven thousand eight hundred and fourteen acres, the mistake being caused by following old particulars of sale, and it appeared that the sale was based on the rental, and not on the quantity, it was held that the vendee, if he insisted on the purchase, must take the contract as it stood, without compensation.* Where, however, the land exceeded the description by a large number of acres, and the purchaser insisted on performance as to the whole, he was compelled to allow the vendor compensation for the excess.⁴ Much must of course depend upon the language and nature of the contract, whether or not the number of acres specified is of the essence of the purchase, or is only description. When a tract of land is sold by name for a given sum, neither party claiming to know exactly the number of acres, but as so much more or less, and there is a slight variation in the estimated quantity, it will not present a case for compensation in respect to either an excess or deficiency.⁵

Faure v. Martin, 7 N. Y., 219; *Ketchum v. Stout*, 20 Ohio, 453; *Stull v. Hurrt*, 9 Gill, 446; *Weart v. Rose*, 16 N. J. Eq., 290. And see *Stephens v. Hudson*, 45 Ga., 513.

¹ *Shovel v. Bogan*, 2 Eq. Ca. Abr., 688.

² *Hill v. Buckley*, 17 Ves., 394; *Glover v. Smith*, 1 Dessaus Eq., 433; *Wainright v. Read*, 573; *Durett v. Simpson*, 3 Monroe, 519; *Reynolds v. Vance*, 4 Bibb., 215; *Nelson v. Carrington*, 4 Munf., 332.

³ *Durham v. Legard*, 34 L. J. N. S., 589. ⁴ *Leslie v. Thompson*, 9 Hare, 273.

⁵ *Pedens v. Owens*, Rice Eq., 55; *Smith v. Evans*, 6 Binney, 102; *Stebbins v. Eddy*, 4 Mason, 414; *Brown v. Parish*, 2 Dana, 9; *Howes v. Barker*, 3 Johns,

§ 510. *Where rights of third persons intervene.*—The vendee may be compelled to accept partial performance with compensation, or to abandon the contract, for the reason that a specific performance would injuriously affect the interests of other persons in the land. A lot having been purchased under an oral agreement, the purchase money paid, possession taken, and a substantial building erected by the vendee, the vendor discovered an error in the front boundary which took in ten feet of the street, and affected injuriously the rights of other parties who had in good faith purchased lots on the street and erected buildings thereon. The court considering that, although those rights were subsequent in time, and therefore subordinate to those of the vendee, yet that they furnished equitable considerations to be regarded in adjudicating upon the rights between the parties to the suit, held that specific performance must be refused unless the vendee would accept a conveyance with boundaries conforming to the line of the street, with compensation for the land cut off by that line, and for the damages occasioned by the necessity of removing his building from the limits of the street.¹

§ 511. *Refusal of wife to unite in conveyance.*—As a rule, where a person contracts for the purchase of real es-

506; *Weaver v. Carter*, 10 Leigh, 37; *Marvin v. Bennett*, 8 Paige Ch., 312; *Twyford v. Wareup*, Finch, 310; *Hill v. Buckley*, 17 Ves., 394; *Anon*, 2 Freeman, 106. In *Stebbins v. Eddy*, *supra*, Story, J., said: "It seems to me that there is much good sense in holding that the words 'more or less,' or other equivalent words, used in contracts or conveyances of this sort, should be construed to qualify the representation of quantity in such a manner that, if made in good faith, neither party should be entitled to any relief on account of a deficiency or surplus. Nor am I prepared to admit that the fact that the sale is not in gross, but for a specific sum by the acre, ought necessarily to create a difference in the application of the principle. I do not say that cases may not occur of such extreme deficiency as to call for relief; but they must be such as would naturally raise the presumption of fraud, imposition, or mistake, in the very essence of the contract. Where the sale is fair, and the parties are equally innocent, and the quantity is sold by estimation and not by measurement, there is little if any hardship, and much convenience, in holding to the rule *caveat emptor*."

¹ *Curran v. Holyoke Water Power Co.*, 116 Mass., 90. A decree for even a partial performance may be refused on the ground that it would injuriously affect third persons. See *ante*, § 205.

tate, supposing that the vendor can give him a clear title, and the wife of the vendor refuses to join her husband in the conveyance, the vendee may, at his option, decline to take a deed executed by the husband alone, and bring an action against him for breach of covenant; or the vendee may accept the deed as part performance, and retain so much of the purchase money as shall be proportionate to the outstanding contingent interest of the wife.¹ If the purchaser, when he enters into the contract, knows that the vendor has a wife, he of course takes the chances of the wife's refusal to release her right of dower, and, in the latter event, if he insists on performance, he cannot justly claim, and will not be entitled to, anything more than a conveyance of the husband's estate. The rule is the same, where the husband has only a life interest in possession, and his wife an interest in remainder.² In Pennsylvania, specific performance of a contract to sell real estate, will not be decreed against a vendor who is a married man and whose wife refuses to join in the conveyance, unless the vendee is willing to pay the full amount of purchase money, and accept the deed of the vendor without his wife joining.³ In

¹ *Wingate v. Hamilton*, 7 Ind., 73; *Zebley v. Sears*, 38 Iowa, 507. See *Watts v. Kinney*, 3 Leigh, 293; *Yost v. De Vault*, 9 Iowa, 60; *Richmond v. Robinson*, 12 Mich., 193; *Weller v. Weyant*, 2 Grant Cas., 103. In Indiana dower at common law is abolished, and an inchoate right to one-third of the realty in fee simple substituted; and where the wife does not join with her husband in a deed of his land, there will be an abatement from the contract price of the ascertained value of the wife's inchoate interest. *Martin v. Merritt*, 57 Ind., 34. Although a bond to compel the wife to convey at a future time would be void, yet a bond executed by the husband alone in the life-time of his wife conditioned that he would convey with a perfect title at a future time, would be binding on him, and, upon a breach of it, damages might be recovered against him by suit upon the bond. *Brewer v. Wall*, 23 Texas, 585; *Allison v. Shilling*, 27 Ib., 450.

² *Greenaway v. Adams*, 12 Ves., 395; *Castle v. Wilkinson*, L. R. 5, Ch. 534; *Barnes v. Wood*, L. R. 8, Eq. 424; *Clark v. Reins*, 12 Gratt., 98; *ante*, § 506. But see *Barker v. Cox*, L. R. 4, Ch. D., 464. Where land was devised subject to the support and maintenance of the widow, it was held that the language did not create a trust, but an incumbrance, and that a purchaser from the devisee was entitled to a conveyance of such title as he had. *Downer v. Church*, 44 N. Y., 647.

³ *Clarke v. Seirer*, 7 Watts, 107; *Riesz's Appeal*, 23 Pa. St., 485; *Burke's Appeal*, 75 Ib., 141. In *Riesz's Appeal*, *supra*, the court, per Sharswood, J., said: "The same sound policy which forbids a decree for the execution of a deed by the husband to be enforced by his imprisonment if he cannot obey, prevents any decree looking to compensation, abatement, or indemnity. The case does not

New Jersey, 'it has been held that the court will not order a defendant to procure a conveyance or release by his wife, or to furnish indemnity against her right of dower, except in cases of clear fraud.¹ In such case, if the vendee is not willing to pay the full amount of purchase money and accept a deed from the husband alone, a decree for specific performance will be refused, and the vendee left to his remedy at law.² In a suit for the specific performance of a contract

fall within the principle of those decisions where the vendor who cannot make title to all he has contracted to convey is held to be not thereby relieved from specific performance as far as in his power, but shall be compelled to execute his contract with a reasonable abatement in the price. The right of dower of the widow is of such a contingent nature, depending, as it does, as well upon her surviving her husband, as on her continuance in life after his death, that no abatement in the price can be made which will be just to both parties, without in effect making a new contract for them; a contract which, perhaps in the first instance, neither party would have come into, certainly not the vendor. Receipt of the purchase money in full may have been the main object of the sale, to enable him to pay debts, or carry out other plans. If he is to be subjected to serious pecuniary loss by his wife's refusal to join, it will operate almost as powerfully as the peril of imprisonment, as a moral coercion and compulsion upon her to yield her consent, instead of that free will and accord which the law jealously requires her to declare by an acknowledgment upon an examination before a magistrate separate and apart from her husband. The learned master, to whom it was referred to report what amount of the purchase money should be retained by the vendee upon mortgage, as a compensation for him for any claim the wife might thereafter make against the premises for dower, reported that, in his opinion, not less than forty per cent. of the price should be left in his hands for that purpose; a result no doubt just as to him. But how as to the vendor, who was personally in no default? No stronger argument could be adduced to show the impolicy of making any decree." The only portion of the foregoing reasons assigned by the learned judge for denying compensation to the purchaser, under the circumstances supposed, entitled to consideration, is the presumed danger of coercion to the wife; and that seems more imaginary than real. Certainly, if the vendor has undertaken to give his vendee an unincumbered title, and is unable to do it in consequence of the refusal of his wife to join in the conveyance, equity and good conscience require that he should make up the deficiency by compensating or indemnifying the vendee, who, without his own fault, must lose his entire bargain or accept a partial performance. Whatever may be the private motive of the vendor in selling, or his disappointment in not obtaining the whole purchase money, he cannot be justified in evading his just obligations to an innocent vendee. See remarks of Gordon, J., in *Burk v. Serrill*, 80 Pa. St., 413, confirmatory of the ground taken by Sharswood, J., *supra*.

¹ *Hawralty v. Warren*, 18 N. J. Eq., 124.

² *Reilly v. Smith*, 25 N. J. Eq., 158. But see *Peeler v. Levy*, 26 Ib., 330. A., holding the title to real estate, in trust for his wife, by her direction sold the same to B., who had no knowledge of the wife's interest therein. Part of the purchase money was paid down, pursuant to the contract, and the balance afterward tendered and a conveyance demanded, which A. refused on the ground that his wife declined to give her consent thereto, or to unite in its execution. It was held that as soon as A. sold the land to B., at his wife's request, her equity was changed from the land to the purchase money; that there was therefore in the case no question of "purchaser without notice," or of "estoppel," or of the power

for the exchange of lands, it appeared that the defendant's wife, after assenting to the exchange, subsequently refused to unite with her husband in the conveyance, and that this refusal was owing to the contrivance and fraud of the husband. The court ordered that the agreement be performed, and that it be referred to a master with directions to settle the conveyances, and if the wife of the defendant refused to join her husband in a deed, then to direct the conveyances to be so made between the parties, that the complainant might hold in the land which he conveyed security against any future claim to be set up by the defendant's wife.¹ With respect to the mode of compensation, instead of an abatement from the purchase money, an indemnity may be given against the risk, a portion of the purchase money being kept in court, or retained by the vendee secured by a mortgage on the land. In one case Lord Eldon said that the proper compensation was indemnity, by which the loss, if it should happen, would be made good; and if it did not happen, there was no occasion for compensation. It was accordingly referred to a master to settle such security as, under all the circumstances of the title, should appear just and reasonable; and, the case having been reargued, the decree was affirmed.² In a suit for the specific performance of a bond given by the husband alone for the conveyance of land, it was decreed that if the wife did not join in the deed, one-third of the purchase money should be retained by the clerk, with whom the money had been deposited, for the wife's dower interest. Held error. The appellate court said: "There is no more warrant in the

of a court of equity to decree against a husband a conveyance of the estate of his wife; but that as the sale was made by A. in the legitimate exercise of his powers as trustee, B. was entitled to specific performance notwithstanding the objection of A.'s wife. *Rostetter v. Grant*, 18 Ohio St., 126.

¹ *Young v. Paul*, 2 Stockt. Ch., 401.

² *Milligan v. Cooke*, 16 Ves., 1. Where the wife does not join in the deed, or otherwise release her dower, the measure of damage is the difference, if there be any, between the contract price and the proved value of the property at the time of the breach. *Brinckerhoff v. Phelps*, 43 Barb., 469; *Barb v. Cole*, 28 N. Y., 261; *Pumpelly v. Phelps*, 40 Ib., 59; *Heimburg v. Ismay*, 35 N. Y. Supr. Ct., 35.

record for retaining the exact number of dollars and cents named than there is for any other sum. Under such circumstances, we have concluded to remand the cause with directions, if the parties shall so desire, to take testimony as to the value of the wife's interest in the land, either by a master or otherwise; and, in the light of such testimony, the court below will make the proper order as to the money, so as to protect the rights of the respective litigants."¹ The amount to be deducted is the value of the wife's right at the time of the conveyance, and not the difference between the market value of the whole land with her release, and the value without it. The rule should be the same as if the conveyance had been made with a warranty against the right of dower, and the existence of the right had afterward been discovered, and an action had been brought to recover damages for a breach of the covenant.² Where the amount withheld as an abatement because of the failure of the wife to execute the deed, was equal to the full sum to which she would have been entitled if her husband had been dead, it was held error; that there should have been an inquiry as to the respective ages of the husband and wife, and the proper table resorted to to determine what amount ought to be abated.³ If the vendor, after entering into the contract of sale, dies, and his widow occupies and cultivates a portion of the land assigned her as dower, the vendee ought not to be allowed a gross sum as the presumed value of her present interest in the premises, but be permitted to retain so much of the

¹ Troutman v. Gowing, 16 Iowa, 415.

² Davis v. Parker, 14 Allen, 94. "The proper rule for computing the present value of the wife's contingent right of dower during the life of the husband is to ascertain the present value of an annuity for her life equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value of the annuity for her life, the value of a similar annuity depending upon the joint lives of herself and her husband; and the difference between these two sums will be the present value of her contingent right of dower." Walworth, Ch., in Jackson v. Edwards, 7 Paige Ch., 408.

³ Hazelrig v. Hutson, 18 Ind., 481.

purchase money as may be equal to one-third the value of the land at the date of the contract, upon his giving security by a lien on the land for its subsequent payment without interest.¹ Where a married woman enters into a covenant to convey real estate owned by her in her own right, which she afterward refuses to do, the aid of a court of equity may be invoked to compel money advanced on the purchase price, and the value of permanent improvements made by the vendee on the premises, less the value of the use of such premises, to be refunded.²

§ 512. *Liability of subsequent purchaser.* — It is upon the principle of the transmission by the contract of an actual equitable estate, and the impressing of a trust upon the legal estate for the benefit of the vendee, that the doctrine of the specific performance of contracts for the sale and purchase of land mainly depends.³ A purchaser, who has fulfilled the contract on his part, is entitled to specific performance against one who, with knowledge of his equities, has succeeded to the interest of the vendor. So, if the owner of land, after entering into a contract of sale, mortgages the land, one who buys the land at the foreclosure sale takes it subject to the equities of the vendee in possession.⁴ For it is a familiar doctrine, that a purchaser from a trustee with notice of the trust, stands in the place of his vendor, and is as much a trustee as he was;⁵ and the *cestui que trust* may follow the trust

¹ *Springle v. Shields*, 17 Ala., 295. *Chilton, J.*: "The rule which would make it unjust to the parties to allow a sum in gross to be paid to the widow in lieu of dower in the land, would equally seem to forbid that a sum in gross, estimated as the supposed value of the dower, should be allowed the alienee as against the estate of the vendor. . . . The uncertainty of such a rule, and the impracticability of attaining by its application the justice of the case, incline us to eschew it whenever it can be done. We are aware that cases may arise, and have arisen, where juries are compelled to go into such estimates to ascertain the damage the vendee has sustained by reason of such incumbrances. But the case at bar is one where the court being called upon to exercise its extraordinary jurisdiction, has the power to require the parties to do justice, and to adopt a rule which, while it may not meet the entire justice of the case, at least approximates more nearly to it than any other we can adopt."

² *Frarey v. Wheeler*, 4 Oregon, 190. See *Farley v. Palmer*, 20 Ohio St., 223.

³ *Haughwout v. Murphy*, 22 N. J. Eq., 531; *S. C.* 21 Ib., 118.

⁴ *Laverty v. Moore*, 33 N. Y., 658. ⁵ *Story v. Lord Windsor*, 2 Atk., 630.

property in the hands of the purchaser, or may resort to the purchase money as a substituted fund.¹ Therefore if the vendor again sells the property of which, by reason of the first contract, he is only seized in trust, he will be considered as selling it for the benefit of the person for whom by the first contract he became trustee.² Or the second purchaser, if he have notice, at the time of the purchase, of the previous contract, will be compelled to convey the property to the first purchaser.³ If the transfer is not *bona fide*, but intended to deprive the party, entitled to a conveyance, of his just rights by an attempt to put the land out of his reach, the court has jurisdiction on the ground of fraud.⁴ The second vendee, in order to hold the title against the contract of sale, must not only have been a *bona fide* purchaser without notice, but he must have paid the purchase money. That securities have been given for the payment, is not sufficient to protect him. The lien of the purchaser under the prior contract would be a sufficient defence to such securities.⁵ In England, until the delivery of the deed, and the payment of the entire consideration, a *bona fide* purchaser is not protected as against the estate of the equitable owner under a prior contract, even though he contracted to purchase, accepted his deed, and paid part of the purchase money in good faith; his only remedy being against his vendor to recover back what he has paid on a consideration which has failed. In this country, the doctrine has been sometimes qualified to the extent of enforcing the prior contract on condition that the second purchaser shall be indemnified for the purchase money paid,

¹ Murray v. Ballou, 1 Johns Ch., 566; McMorris v. Crawford, 15 Ala., 271; Dickinson v. Any, 25 Ib., 424.

² 2 Spence's Eq., 310.

³ Hoagland v. Latourette, 1 Green Ch., 254; Downing v. Risley, 2 McCarter, 94; Keegan v. Williams, 22 Iowa, 378; Smoot v. Rea, 19 Md., 398.

⁴ Foss v. Haynes, 31 Me., 81.

⁵ Notice, before actual payment of all the purchase money, although it be secured and the conveyance executed, or before the execution of the conveyance notwithstanding the money is paid, is equivalent to notice before the contract. Hill on Trustees, 165.

and also for permanent improvements made on the land before notice. "The doctrine of the English courts is necessary to give effect to the principle that, in equity, immediately on the contract to purchase, an equitable estate arises in the vendee, the legal estate remaining in the vendor for his benefit. Qualified by the obligation to make compensation to any subsequent *bona fide* purchaser who has paid only part of the consideration money, for all disbursements made before notice, the rule is every way consonant with correct principles. Such indemnity is protection *pro tanto*. . . . The rule of law which deprives a subsequent purchaser who has contracted and accepted a conveyance and paid part of the purchase money in good faith of the fruits of his purchase without indemnity, is exceedingly harsh, and often oppressive in its application. Mitigated by the obligation to make indemnity for payments and expenditures before actual notice, its operation is nevertheless frequently inequitable. A party who asks the enforcement of a rule of this nature against another who is innocent of actual fraud, must seek his remedy promptly. He may lose his right to specific relief against the land by laches, and be remitted to the unpaid purchase money as the only relief which will be equitable."¹ Although a husband may make a gift to his wife, or a settlement upon her, without the intervention of a trustee, and equity will sustain it if it be no more than a reasonable provision for her, be proportioned to his circumstances, and not injurious to his creditors, yet it is not certain that such a conveyance would be sustained against a subsequent *bona fide* purchaser from the husband, unless it were for a valuable consideration.² One who purchases *pendente lite*, is bound by the decree which may be made against the party from whom he takes his title;³ and he need not

¹ Dupue, J., in *Haughwout v. Murphy*, *supra*. Where the owner of land has entered into a contract to sell the same land to a third person, the latter must be made a party defendant in a suit for the specific performance of the original contract. *Fullerton v. McCurdy*, 4 Lans., 132.

² *Coates v. Gerlach*, 44 Pa. St., 43.

³ *Sorrell v. Carpenter*, 2 P. Wms., 482; *Garth v. Ward*, 2 Atk., 175; *Gaskell v. Durdin*, 2 B. & B., 169; *Masson's Appeal*, 70 Pa. St., 27.

be made a party to the suit, in order to be bound.¹ Before it was provided by statute that notice of the pendency of the suit must be filed in order to charge a subsequent purchaser from the defendant with notice of the litigation, a subpoena served, and bill filed, were necessary before the suit was regarded as commenced so as to make its pendency constructive notice to persons deriving title from the parties, and to give the decree a conclusive effect against such persons.² Where the vendor sells the land to a third person who has knowledge of the prior contract of sale, and, pending a suit by the original purchaser against his vendor and the subsequent grantee for specific performance, the latter conveys the land to another, the complainant will be entitled to a decree against such other for the purchase money paid on the original contract.³ So, the vendee may, as against a third person buying either with or without notice, waive his claim to the land, and take the money paid instead.⁴ Where a party having a contract for the purchase of real estate, afterward agrees to sell the same to a third person whom he puts in possession, and the original vendor gives such third person a deed of the property before he has paid for it in full, and the latter is insolvent, the first purchaser may compel his vendee to reconvey the property to him.⁵ If the vendee obtains from a third person an advance of money to meet his payments on the contract of purchase, under an agreement to give a mortgage on the land to secure repayment, his interest in the property will be holden to the same extent as if the mortgage had been given pursuant to the agreement.⁶

¹ *Metcalfe v. Pulvertorft*, 2 V. & B., 205; *Snowman v. Harford*, 57 Me., 397.

² 2 Mad. Ch. Pr., 325; *Hayden v. Bucklin*, 9 Paige Ch., 512.

³ *Oliver v. Croswell*, 42 Ill., 41.

⁴ *Dustin v. Newcomer*, 8 Ohio, 49; *Haughwout v. Murphy*, 22 N. J. Eq., 531.

⁵ *Bud v. Hall*, 30 Mich., 374. Where the vendor of land holds no obligations or securities of a negotiable character, his selling the property to a third person upon default of the purchaser to fulfil, is a sufficient declaration of forfeiture. *Warren v. Richmond*, 58 Ill., 52; *Little v. Thurston*, 58 Me., 86.

⁶ *Cole v. Cole*, 41 Md., 301. In this case, the agreement to give the mortgage was verbal. A note was given by the vendee to stand as evidence of the ad-

§ 513. *Where the interest is joint.*—If a purchase be made by parties interested in it by mutual agreement, neither can rightfully exclude the other from what was designed to be for the common benefit; and if one of them seeks, in violation of his good faith to his co-tenant, a private benefit to himself in matters appertaining to the common right, he will be deemed a trustee for the benefit of both.¹ Thus: where two individuals enter into an agreement for the purchase of property in moieties, neither of them can lawfully secure any private or personal benefit to himself. But any advantage obtained in paying off incumbrances is deemed in equity for their mutual benefit and on a mutual trust.² The contract must, however, of course, be valid and binding, and of such a character as to be capable of being enforced. The purchasers of real estate sold by executors, relinquished their right in the same in favor of D., the executors agreeing that D. should be substituted as purchaser, and reporting him as such to the orphans' court, which ratified the sale. G. was in fact jointly interested with D. in the purchase to the extent of an undivided half

vance until a mortgage was executed. It was held that the giving of the note did not destroy the right of the complainant to have the mortgage executed, and that the statute of frauds, if it had been proved, would have been no defence; the refusal to give a mortgage, being a fraud.

¹ Flagg v. Mann, 2 Sumner, 486.

² Carter v. Horne, 1 Eq. Abr. 7, Pl. 13; Fawcett v. Whitehouse, 1 R. & M., 132; Burton v. Wookey, 6 Mad., 367. "When two devisees are in possession under an imperfect title derived from their common ancestor (the case then before the court), there would seem naturally and equitably to arise an obligation between them, resulting from their joint claims and community of interest, that one of them should not affect the claim to the prejudice of the other. It is not consistent with good faith, nor with duty, which the connection of the parties as the claimants of a common subject created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim which the relationship of the parties as joint devisees created. Community of interest produces a community of duty; and there is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding incumbrance or an adverse title, to disseize and expel his co-tenant. It cannot be tolerated when applied to a common subject in which the parties had equal concern, and which created a moral obligation to deal candidly and benevolently with each other, and to create no harm to their joint interest." Kent, Ch., in Horne v. Fonda, 5 Johns Ch., 388, 407.

of the property, under a verbal agreement between them which was unknown to the executors. D. and G. having taken possession of the property and made payment, the larger portion of which was advanced by G., D. died. In a suit by G. to restrain the executors from conveying the land to the heirs of D., the heirs from accepting a conveyance, the administratrix of D. from collecting the rents, praying for the appointment of a receiver, and that G. might be declared to be the owner of an undivided half of the land upon his paying his share of the balance of the purchase money, it was held that specific performance of the agreement between D. and G. could not be enforced, and that G. was not entitled to relief on the ground of a resulting or constructive trust; but that he would be awarded, as compensation, a return of the money paid and expended by him in the purchase of the property, with interest thereon, and be deemed a general creditor against the assets of the estate of D. for the amount ultimately found to be due him.¹

§ 514. *The giving of damages.*—It is highly important that a court of equity should have jurisdiction to award damages, without compelling the parties to resort to another forum, whenever the doing of complete justice requires their payment; and such a practice is alone consonant with the doctrine of equity, that, when the court has once acquired jurisdiction, it will retain it in order to satisfy all the just requirements of the case between the parties in respect to the subject matter. It seems, however, that though at an early date equity recognized jurisdiction as to damages when they were incident to the case already before the court,² subsequently disclaimed it, holding that there was a wide distinction between compensation and damages, the extent and measure of which were different.³

¹ Green v. Drummond, 31 Md., 71.

² Cleaton v. Gower, Finch, 164; City of London v. Nash, 3 Atk., 512; Denton v. Stewart, 1 Cox, 258; Greenaway v. Adams, 12 Ves., 401. And see Cud v. Rutter, 1 P. Wms., 570.

³ Gwillim v. Stone, 14 Ves., 128; Todd v. Gee, 17 Ib., 273; Sainsbury v. Jones, 5 My. & Cr., 1.

But in more modern times, the constant tendency and inclination of the court have been to take a more liberal view, and to reassert its original position on the subject with increased latitude.¹

§ 515. *Damages awarded as ancillary to other relief.*—As a general rule, compensation is regarded as an incident only, unless there is a special equity authorizing the court to give relief; and jurisdiction will not be exercised for the sole purpose of assessing damages for a breach of contract.² Where, for instance, a verbal agreement, being void under the statute of frauds, is incapable of being specifically enforced, the bill will not be retained to award damages to the defendant for the value of services rendered on the faith of the agreement, and for money advanced for the protection and management of the property.³ If the jurisdiction attaches, except as ancillary to a

¹ Such a jurisdiction ought certainly to be exercised where the remedy at law is inadequate, and irreparable injury would otherwise be sustained. See, in affirmation of the jurisdiction in this country, *Pratt v. Law*, 9 Cranch, 492, 494; *Phillips v. Thompson*, 1 Johns Ch., 150; *Parkhurst v. Van Cortlandt*, lb., 286; *Woodcock v. Bennett*, 1 Cowen, 711; *Andrews v. Brown*, 3 Cush., 130. *Contra*, *Hatch v. Cobb*, 4 Johns Ch., 560; *Kempshall v. Stone*, 5 lb., 195.

² *Newham v. May*, 13 Price, 732; *Hatch v. Cobb*, *supra*; *Sims v. McEwen*, 27 Ala., 184; *Harrison v. Deramus*, 33 lb., 463; *Morss v. Elmendorf*, 11 Paige Ch., 277; *Richmond v. Dubuque & Sioux City R.R. Co.*, 33 Iowa, 422; *Doan v. Mauzey*, 33 Ala., 227; *Carroll v. Wilson*, 22 Ark., 32; *Welsh v. Bayaud*, 21 N. J. Eq., 186. When, in a suit for the specific performance of a contract to convey real estate, it is conceded that the defendant never had the title, and is not able to fulfil, the court cannot, by a compulsory reference, deprive him of the right to have the question of damages tried by a jury, but should send the case to the circuit for trial. *Stevenson v. Buxton*, 37 Barb., 13.

³ *Horn v. Luddington*, 32 Wis., 73. Where after real estate had been conveyed under a contract of sale, securities given for the purchase money, and a bill filed by the vendee for a rescission of the contract on the ground of fraud, it having been held that he was not entitled to the relief prayed, it was further held that the damages he had sustained could not be ascertained by the court and decreed to him in abatement of the purchase money. *Robertson v. Hogsheds*, 3 Leigh, 667. "I take it a bill for damages only will not lie in equity. The court could only ascertain these damages by sending the case to a court of law. To that court, therefore, the party should apply instead of clogging the litigation by a suit in equity, which could only end where he ought to have begun. Would it be just (even though the fraud be established), that the defendants should be charged with the costs of this unnecessary proceeding? I think not. Had an issue been directed and found for the plaintiff, surely the plaintiff ought to be charged with the additional costs unnecessarily incurred by going through the court of chancery to get into a court of law; since he might at once have got into the court of law by issuing his writ for the deceit. Whether the statute of limitations will bar an action at law which the appellant may now

specific performance, or to some other relief, "it must be under very special circumstances and upon peculiar equities, as, for instance, in cases of fraud, or in cases where the party has disabled himself by matters *ex post facto* from a specific performance, or in cases where there is no adequate remedy at law."¹ Where the plaintiff did not establish a case entitling him to equitable relief, and, if the bill was dismissed, the plaintiff would be remediless, because the statute of limitations would be a bar to a new action, the cause was ordered to the circuit court for a trial as to the claim for damages.* So, when the specific performance of a parol agreement cannot be decreed in consequence of uncertainty in its terms, or of the statute of frauds being relied on, the court will, if there is no remedy at law, or it is uncertain or embarrassed, decree compensation to the extent of the purchase money paid, and the value of beneficial and lasting improvements.* If a court of equity has jurisdiction of the subject of the controversy, jurisdiction for compensation or damages will always attach where it is ancillary to the relief prayed for.⁴ This was held, in a suit

bring, it would be premature to say. But, though this inconvenience should follow, it ought not to lead the court to establish a precedent sustaining a mere action for damages in equity. Such a proceeding has been questioned even in a suit for specific performance, where the defendant, after the bill was filed, had disabled himself to perform; and has been distinctly reprobated where he had so disabled himself before filing the bill, and the plaintiff knew of the fact before he commenced the suit." Per Tucker, Prest.

¹ Story's Eq. Juris., Sec. 799; *Gupton v. Gupton*, 47 Mo., 37; *Peler v. Levy*, 26 N. J. Eq., 360; *Izard v. Mays Landing Water Power Co.*, 31 Ib., 511. In *Barlow v. Scott*, 24 N. Y., 40, the complainant prayed for specific performance or damages. The equitable relief was denied. Lott, J., said: "It is, however, insisted by the defendant that it was erroneous for the court to order judgment in favor of the plaintiff on a trial of the issue without a jury. There is nothing to show that the action was so tried against or without the defendant's consent. The objection does not appear to have been made at the trial, and, if it was, should have been stated in the case; and not appearing there, it cannot be urged in this court as a ground for reversing the judgment." It was not intimated what would have been proper if the objection had been taken at the trial.

² *Genet v. Howland*, 45 Barb., 560.

³ *White & Tudor's Leading Cas. in Eq.*, 527; 65 Law Lib., 527. It has been held that where it appears from the contract that the vendee, by paying a stipulated sum, has the right to relieve himself from the purchase, a court of equity may direct the stipulated sum to be paid by the vendee to the vendor, although a recovery by the vendor could have been had for the same at law. *Cathcart v. Robinson*, 5 Pet., 263.

⁴ *Holland v. Anderson*, 38 Mo., 55; *Woodman v. Freeman*, 25 Me., 531; *Bell v. Thompson*, 34 Ala., 633; *Prothero v. Phelps*, 35 Eng. L. & Eq., 523.

for specific performance brought by the vendor, where the answer stated a willingness of the vendee to fulfil the contract whenever the court should award to him compensation for the damages he had sustained in consequence of the acts of the plaintiff and his agents in interfering with the vendee's possession and enjoyment of the land, which was decreed.¹ Where a court of equity has jurisdiction, but the relief prayed for cannot for some reason be granted, compensation in damages may be granted in lieu thereof. Thus, if a plaintiff was originally entitled to the specific performance of a contract of sale, but before the final decree it becomes impossible for the defendant to execute a conveyance, so that the relief prayed for in the bill cannot be decreed, the court will not turn the plaintiff over to seek his damages in an action at law, but will proceed to decree him compensation.² A. and B., who owned adjoining premises, agreed to erect a party wall. B. afterward refusing to do his share of the work, A. constructed the entire wall, and filed a bill to restrain B. from using the wall. It was thereupon agreed that B. might proceed with his building upon giving bonds for the payment of such an amount as should be adjudged to A. It was held that as the court no longer had power to decree the specific relief originally prayed for, as a necessary consequence, both inherently and by virtue of the agreement between the parties, it might ascertain and award compensation in damages.³

¹ *Nagle v. Newton*, 22 Gratt., 814. "We think the doctrine on this subject is now well settled, and may be succinctly stated to be this: Where the court of chancery has jurisdiction of the case, and where it is a case proper for specific performance, it may, as ancillary to specific performance, decree compensation or damages. And where the ascertainment of damages is essential in order to do complete justice between the parties in the case before it, the court ought not to send the parties to another forum to litigate their rights; but should refer the matter to one of its own commissioners, or direct an issue *quantum damnificatus* to be tried at its own bar." *Ib.*, per Christian, J.

² *Masson's Appeal*, 70 Pa. St., 26. The assignee of a title bond may sue in equity for specific performance and pray for damages in case specific performance be found impossible. The measure of damages in such a case would be the amount paid on the purchase, whether paid to the vendor, or to other persons with his assent or by his direction, with the understanding, express or implied, that it should be taken as part of the consideration, and be so credited. *Am. Land Co. v. Grady*, 33 Ark., 550.

³ *Hopkins v. Gilman*, 22 Wis., 476. Where a person agreed to build a house

§ 516. *Where the suit is brought solely for damages.*—As a rule, when the plaintiff knew at the time of bringing his suit that the contract could not be specifically performed or decreed, the bill will not be sustained for a compensation in damages. It is then reduced to the case of a bill filed for the sole purpose of assessing damages for a breach of contract, which is matter strictly of legal, and not of equitable jurisdiction.¹ In New York, under the existing practice by which the former distinction between legal and equitable actions has been abolished, and legal and equitable causes of action and remedies made capable of being united and administered in one action, the old rule as to knowledge of the plaintiff affecting his right to damages in equity, is no longer regarded. When the complainant states facts giving an equitable cause of action, and also a legal cause of action, arising out of the same transaction, the party is entitled to have the latter tried, if necessary to obtain his rights, although he fails to show a right to equitable relief. The claim of damages for breach of contract “must be tried by the court or a referee, unless some ques-

on certain land, and to take a lease of the land, it was held that the plaintiff might enforce the contract as to the lease, and claim damages for the default in not building the house. *Soames v. Edge*, Johns, 669; *Mayor of London v. Southgate*, 38 L. J. Ch., 141. See *Jervis v. Smith*, 1 Hoffm. Ch., 470; *Oliver v. Crosswell*, 42 Ill., 41; *Smith v. Kelley*, 56 Me., 64; *Woodman v. Freeman*, 25 Ib., 531; *Rockwell v. Lawrence*, 2 Halst. Ch., 190; *Bowie v. Stonestreet*, 6 Md., 418; *Aday v. Echols*, 18 Ala., 353; *Johnson v. Glancy*, 4 Blackf., 94; *Nagle v. Newton*, 22 Gratt., 814. In contracts relating to personal property, the court may give compensation in damages where the performance becomes impossible, as is done in like suits for the specific performance of contracts relating to real property. *Tenney v. State Bank*, 20 Wis., 152. The reasons why a court of equity will not ordinarily interfere to decree a specific delivery of chattels is, that by a suit at law, full compensation may be obtained in damages, although the thing itself cannot be specifically obtained; there being no reason why equity should afford aid to the party when the remedy at law is adequate. The rule is illustrated by the exceptions to it; and these, as we have heretofore seen, always depend upon peculiar circumstances, as where the thing is of peculiar value or importance, and the loss of it cannot be compensated in damages, or where some other ingredient of jurisdiction is involved in the transaction. *Scott v. Bilgerry*, 40 Miss., 119. See *ante*, §§ 16, 17, 18.

¹ *Hatch v. Cobb*, 4 Johns Ch., 559; *Kempshall v. Stone*, 5 Ib., 193; *Doan v. Mauzey*, 33 Ill., 227; *Lewis v. Yale*, 4 Fla., 437; *Morss v. Elmendorf*, 11 Paige Ch., 277; *McQueen v. Chouteau*, 20 Mo., 222; *Barnett v. Mendenhall*, 42 Iowa, 296. See *Smith v. Kelly*, 56 Me., 64; *Franz v. Orton*, 75 Ill., 100; *Henty v. Schroder*, L. R. 12, Ch. D. 666.

tions of fact involved are ordered by the court to be tried by a jury. Either party has a right to a jury, if the ends of justice require the trial of both; or both may be tried by the court or a referee, if the parties so desire.”¹

§ 517. *In case specific performance cannot be decreed.*—Where the defendant deprives himself of the power to perform the contract specifically during the pendency of a suit to compel such performance, a court of equity may retain the suit, and award to the complainant compensation in damages, to prevent a multiplicity of suits. And such a decree will be proper where the defendant has deprived himself of the power to perform the contract prior to the filing of the bill, but without the knowledge of the complainant; or even when the defendant never had the power to perform, if the complainant filed his bill in good faith, supposing, when he brought his suit, that specific performance of the contract could be obtained.² “The rule assumes, of course, a sufficient contract, performance, or an offer to perform by the plaintiff, and every other element requisite on his part to the cognizance of his case in chancery; and that the special relief sought is defeated, not by any defence or counter equities, but simply because an order therefor would be fruitless from the inability of the defendant to comply. The jurisdiction is fixed by establishing the equitable right of the plaintiff. Relief must then be given by a decree in the alternative, awarding damages unless the defendant should secure the specific performance sought. In many cases this would be an effective and proper course; inasmuch as the defendant, although not having himself at the time the title or capacity requisite for such performance, might be able to procure it otherwise. The jurisdiction is not lost when the

¹ Sternberger v. McGovern, 56 N. Y., 12, per Glover, J.

² Morss v. Elmendorf, *supra*; Wiswall v. McGowan, Hoffm. Ch., 125; Woodward v. Harris, 2 Barb., 439; Holland v. Anderson, 38 Mo., 55; Hamilton v. Hamilton, 59 Ib., 232; Woodcock v. Bennett, 1 Cowen, 71; Hall v. Delaplaine, 5 Wis., 206; Chartier v. Marshall, 56 N. H., 478.

court, instead of such alternative decree, determines to proceed directly to an award of damages or compensation. The peculiar province of a court of chancery is to adapt its remedies to the circumstances of each case as developed by the trial. It is acting within that province, when it administers a remedy in damages merely in favor of a plaintiff who fails of other equitable relief to which he is entitled without fault on his part. The diversity of practice in this respect, and the doubt as to the jurisdiction, we think must have arisen less from the nature of the relief to be afforded than from the character of the means for determining the amount of compensation to be rendered.”¹

§ 518. *Under English statute.*—In England the court of chancery, until recently, had no power to give damages where, although the case was of a nature entitling the plaintiff to bring a suit for specific performance, yet, owing to the conduct of the defendant, specific performance had become impossible; but the plaintiff was compelled to resort to an action at law. Now, however, by what is known as Sir Hugh Cairns’ act, it is provided that “in all cases in which the court of chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to, or in substitution for, such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct.”² Under the foregoing act, to entitle the plaintiff to damages, either in lieu of specific performance, where, for some special reason, the court declines to decree the latter, or where the suit is brought for the sole purpose of recovering damages, the case established

¹ Milkman v. Ordway, 106 Mass., 232, per Wells, J.

² 21 and 22 Vict Ch. 27, Sec. 2.

by the plaintiff must be of a character over which equity has jurisdiction, although, under the particular circumstances, the contract may not be capable of being specifically enforced.¹ The plaintiff contracted with the defendant for a lease of property for the purpose, as the defendant knew, of carrying on a trade which the plaintiff was about to commence; but, in consequence of the defendant's wilful refusal to fulfil his agreement, the plaintiff could not commence his trade for fifteen weeks. In addition to a decree for specific performance, two hundred and fifty pounds damages were awarded to the plaintiff for his loss

¹ *Lewers v. Earl of Shaftesbury*, L. R. 2, Eq. 270; *Johnson v. Wyatt*, 2 De G. J. & S., 18; *Middleton v. Greenwood*, *ib.*, 142. In *Ferguson v. Wilson*, L. R. 2, Ch. 77, *Turner, L. J.*, said: "I understand the act to mean this. There was great difficulty in cases of specific performance, and also in cases of injunction, before the passing of that act, arising under this state of circumstances. There were many cases where a court of equity would decline to grant specific performance, and yet the plaintiff might be entitled to damages at law; and great complaints were constantly made by the public that when plaintiff came into a court of equity for specific performance, the court of equity sent him to a court of law in order to recover damages, so that the parties were bandied about, as it was said, from one court to the other. The object, therefore, of the act of Parliament was to prevent the parties from being so sent from one court to the other; and, accordingly, the act provides that the court may either in addition to, or in substitution for, the relief which is prayed, grant the relief which would otherwise be proper to be granted by another court. But that act never was intended, as I conceive, to transfer the jurisdiction of a court of law to a court of equity. If, therefore, a plaintiff in a suit in equity had no equitable right at the time of filing the bill (for the case would be quite different if there was an equitable right at the time of filing the bill), so that the bill was altogether improperly filed in equity, I am of opinion that the act has no application; otherwise the consequence would necessarily be, that everybody who had a doubtful case at law would come into equity for specific performance; and, when it appeared that he had no case in equity at all, he would ask for damages, and so almost every action of contract would be transferred from a court of law to a court of equity." *Cairns, L. J.*, said: "The important words of the act are these: 'In all cases in which the court of chancery has jurisdiction to entertain an application for the specific performance of any covenant, contract, or agreement.' That, of course, means where there are, at least at the time of bill filed, all those ingredients which would enable the court, if it thought fit, to exercise its power and decree specific performance; among other things, where there is the subject matter whereon the decree of the court can act. In a case of that kind the court has a discretionary power to award, under certain circumstances, damages in substitution for, or in addition to, the decree for specific performance. The object obviously was to enable the court of chancery to do complete justice, as it was called—a phrase which assumed that there was the power in the court of chancery to make a decree to some extent, but not to make a decree to the whole extent which the case required. But that seems to me not in any way to give to the court a power, where it has no jurisdiction, to decree specific performance for want of the subject matter whereon its decree would operate, to give damages by reason of some antecedent breach of contract."

of profits from his trade.¹ In the case of a contract to give a lease of a hotel, and to make thereon certain repairs, specific performance was decreed as to the giving of the lease, and an inquiry directed as to damages in respect to repairs which were mere incidents of the agreement not affecting its substance.² Where a bill having been filed for the spe-

¹ Jaques v. Miller, L. R. 6, Ch. D. 153.

² Middleton v. Greenwood, 2 De G. J. & S., 142. Under a contract to grant a lease so soon as the proposed lessee should build a house on the land, the lessor was held entitled to damages for the non-building of the house, and to specific performance of the contract to accept the lease. The vice-chancellor said: "Before the passing of this act a court of equity had not jurisdiction in respect of a building contract of this description. But it would have had jurisdiction before the passing of the act to compel the defendant to accept a lease on the plaintiff waiving the condition, which he for his own benefit inserted, that he should not be called upon to grant a lease until a certain time. The defendant has agreed to accept a lease when required, and the court has, therefore, jurisdiction. The statute would not apply to a case where the object of the agreement was simply the building of the house under such conditions and on such terms that it may be assumed the court could not grant specific performance; and, in such a case, a plaintiff could not file a bill to have damages instead of specific performance, because there would be no jurisdiction. But there is a distinct agreement here not only to build the house, but to accept the lease. The court having therefore acquired jurisdiction, may give damages, either in addition to, or in substitution for, specific performance." Soames v. Edge, Johns, 669. Compare Norris v. Jackson, 1 Johns & Hem., 319. And where there was a claim to be paid for materials furnished for repairs of farm buildings, as the court decreed specific performance of the main part of the agreement, which was to grant a lease, it was held that it also had jurisdiction to give relief in respect to the money demand. Lillie v. Legh, 3 De G. & J., 204. See also Samuda v. Lawford, 8 Jur. N. S., 739. A mortgagor having contracted to grant a lease, the proposed lessee paid a year's rent in advance, took possession, and commenced making alterations in the premises. The mortgagee refusing to concur in the lease, the lessee discontinued the work and gave up possession. He thereupon filed a bill for specific performance, praying that the mortgagor might be decreed to redeem and exonerate the premises from the mortgage debt, and from all claims in respect to the same, and that an inquiry might be directed to ascertain the damages sustained by the plaintiff, and the defendant be decreed to pay such damages when ascertained to the plaintiff. Sir J. Romilly, master of the rolls, said: "I have had considerable doubt about this case. My opinion certainly is that Sir Hugh Cairns' act enabling this court to give damages was never meant simply to transfer the jurisdiction from a court of law into equity, and that when persons enter into a contract and know that specific performance cannot be given, they can come into equity merely for the purpose of obtaining damages. For instance, when the purchaser knows that the vendor cannot make a good title to the property sold, it was not intended that he should be enabled to file a bill merely to get the damages assessed under that act. But in a *bona fide* case, where the court at the hearing has thought that the contract could not be specifically performed, the court is enabled, if it shall think fit, to award damages to the party injured. I am disposed to think that if the plaintiff did not know, he had good reason for believing that this court could not give specific performance of this contract, and that if the mortgagee refused to join in the demise, he could do nothing but recover damages at law. But considering the way in which the defendant entered into

cific performance of a contract and damages, the defendant fulfils before the suit is brought to a hearing, the plaintiff is entitled, notwithstanding, to consequential relief in damages for injury sustained in consequence of the delay of the defendant in performing the contract.¹ "A defendant could not be allowed to have it at his option by performing the equitable portion of the relief, to deprive the plaintiff of the consequential relief conferred by statute, or turn him over to a court of law for the completion of his remedy. Such a course would quite frustrate the purpose of the act, without really being of any benefit to either plaintiff or defendant."² If the court would not have interfered previous to Lord Cairns' act, it will not interfere now on the mere possibility that the plaintiff may be entitled to some damages which, by bringing an action, he may be able to recover in a court of law; as if damages are claimed for breach of an agreement to form a partnership.³ Where, in a suit for the specific performance of a resolution passed by the board of directors of a railroad company under which the plaintiff alleged that he was entitled to have a certain number of shares allotted to him, and also prayed that if it

this contract, I am not disposed in this instance to send the case to law, and I will make an order to assess the damages sustained by the plaintiff, and I shall give no costs up to and including the hearing. The plaintiff will get all subsequent costs. The reason why I do not dismiss the bill is, that it is a new case, and I do not think it right under the peculiar circumstances of this case to put the plaintiff to his action at law to recover the damages which he has sustained." *Howe v. Hunt*, 31 Beav., 420; S. C., 8 Jur. N. S., 834.

¹ *Cory v. Thames Iron Works & Shipbuilding Co.*, 11 W. R., 589.

² *Ibid.*, per Wood, V. C.

Scott v. Rayment, L. R. 7, Eq. 112. The chancery amendment act of 1858 does not extend the jurisdiction of the court to cases where there is a plain common law remedy, and where before the statute the court would not have interfered. *Wicks v. Hunt*, Johns, 372. In a case where the court has no jurisdiction to grant the specific performance of a contract, it has no jurisdiction under the 21 & 22 Vict. Ch., 27, to award and assess damages for its non-performance. *Rogers v. Challis*, 27 Beav., 175; as, for instance, an agreement to borrow money, S. C., 7 W. R., 710. "It is admitted on both sides, that the 21 & 22 Vict. Ch., 27, only applies to giving damages where the court gives some specific performance." *Romilly, M. R.*, in *Chinnock v. Sainsbury*, 30 L. J. N. S., 409. In *Collins v. Stutely*, 7 W. R., 710, it was held that under the act, a plaintiff would not be entitled to damages in equity, for the non-performance of an act for which *prima facie* he might have obtained specific performance, after the doing of some act disentitling him to specific performance.

should appear that all the shares had been allotted to the other shareholders, the directors might indemnify him out of their own shares, or might be charged with damages, it appeared that all the shares had been allotted before the filing of the bill, it was held that as relief by way of specific performance was not possible, the plaintiff's claim to damages could not be sustained under Lord Cairns' act.¹ Where the plaintiff in a suit for the specific performance of an agreement to grant a lease, by his delay allowed the term for which the lease was to have been given to expire, before the cause could be heard, it was held that the court would not direct an inquiry as to damages, which was a remedy wholly ancillary to specific performance.² This act makes it discretionary with the court whether in a given case it will or will not award damages.³ The court has no power under the act, upon motion after a decree for the specific performance of a covenant, to add an order for assessing damages for breach of the covenant on facts happening subsequent to the decree.⁴

§ 519. *Interest, rents, and profits.*—Where, under a contract for the sale and purchase of real estate, the vendee is not put in possession, as is usually done in this country, and there is delay in completion, questions sometimes arise as to the rights and liabilities of the respective parties in relation to interest or rents and profits. As the purchase money belongs to the vendor from the time fixed for completing the contract, as a rule he will be entitled to interest on it if it be not then paid or tendered; and as the thing sold becomes the property of the purchaser, he will be entitled to the rents and profits from the same time.⁵ The

¹ *Ferguson v. Wilson*, L. R. 2, Ch. 77. ² *De Brassac v. Martin*, 11 W. R., 1020.

³ *Durell v. Pritchard*, L. R. 1, Ch. 244.

⁴ *Corp. of Hythe v. East*, L. R. 1, Eq. 620.

⁵ *Hart v. Brand*, 1 A. K. Marsh., 161; *Breckenridge v. Hoke*, 4 Bibb, 273; *Ramsay v. Brailsford*, 2 Dessaus Eq., 592; *Boyle v. Rowand*, 3 Ib., 555; *Thompson v. Davenport*, 1 Wash., 127; *Stevenson v. Maxwell*, 2 Const., 408; *Drake v. Barton*, 18 Minn., 462. In *Cole v. Tyson*, 8 Ired. Eq., 170, the vendee was permitted to take possession, and after paying a portion of the purchase money,

general rule may of course be varied by express stipulation ; as where it was agreed that the rents should be reserved to the vendor, which was held to excuse the vendee from the payment of interest on the unpaid purchase money.¹ When rents are charged against the vendee in possession, interest should be allowed him on necessary outlays he has made on the property. If he has taken up obligations for the vendor, he should be credited with the actual amount paid by him.² If it is the fault of the purchaser that the contract is not completed, he will be liable to interest although the purchase money has been ready and lying idle.³ Where the title was not made out until after suit, and the delay was caused by the purchaser's raising other points which made the suit necessary, it was held that, as the delay was not the fault of the vendor, the purchaser must pay interest from the day fixed for completion.⁴ And the vendee will be thus liable, if he has used the money, or derived the least advantage from it. Where the vendee, upon taking possession, paid the money into his banker's, and notified the vendor that he was ready, and, while the title was being investigated, kept at his banker's an amount equal to the purchase money, except for a few days, when it was a little less, it

died leaving minor heirs. Thereupon the vendor entered on the land and claimed it, pulled down and sold houses, built others and finally sold the property. The heirs having brought a suit for specific performance, it was held that the vendor was liable for the rental value of the land during his occupation. Ruffin, C. J., in delivering the opinion of the court, said : " One thus abusing the power given by the legal title, and denying the rights of infants for whom he was trustee, cannot be looked on in a court of equity in any light but that of a *tortfeasor* by reason of a wilful and gross breach of trust, and therefore he is justly chargeable with the highest occupier's rent from the moment of the breach of trust." In another case, where the plaintiff was entitled to a conveyance in March, 1867, and, in November, 1868, the defendants with notice of his equity took possession of the land, denied his right to it, and for more than ten years occupied and claimed it as owners, it was held that he was entitled to the rental value of the land from the commencement of the suit, which was a sufficient demand for a conveyance. The court said : " Whatever may be the rule where a trustee has not himself occupied and enjoyed the trust estate, but has received rents from it, justice and equity demand that where he has wrongfully excluded the true owner, and has himself occupied and enjoyed the fruits of the estate, he shall at least account for its rental value." *Henlen v. Martin*, 53 Cal., 321.

¹ *Brooke v. Champenowne*, 4 Cl. & Fin., 589, 611.

² *Jones v. Jones*, 49 Texas, 683.

³ *Calcraft v. Roebuck*, 1 Ves., 221.

⁴ *Monro v. Taylor*, 3 M'N. & G., 713.

was held that as the purchase money deposited supplied the balance which he must otherwise have kept at his banker's, he was only released from the payment of interest in respect to the difference between the average balance he had maintained at his banker's for three years previous to the purchase, and the average balance during the investigation of the title.¹ Where under a contract for the purchase of land for seven hundred dollars, two hundred dollars were paid down, and the balance was to be paid when the vendor could give a good title, and the vendee had the peaceable possession and enjoyment of the property for fifteen years, without paying or tendering the balance of the purchase money, and the land during that period had largely increased in value, it was held that the purchaser could not maintain a suit for specific performance without a tender of interest or of compensation for the use and occupation.² The vendee will not be chargeable with interest, if the purchase money has been ready and unproductive in his hands, and notice to that effect has been given by him to the vendor, and the delay is caused by the latter.³ In a suit for specific performance, brought by the vendee of land against the vendor, the latter contended that if a conveyance was decreed, the vendee ought to pay interest on the purchase money, although

¹ *Winter v. Blades*, 2 Sim. & Stu., 393. ² *Schuessler v. Hatchett*, 58 Ala., 181.

³ *Howland v. Norris*, 1 Cox, 59; *Powell v. Martyr*, 8 Ves., 146; *Roberts v. Massey*, 13 Ib., 561; *Dyson v. Hornby*, 4 De G. & Sm., 481; *Regent's Canal Co. v. Ware*, 23 Beav., 575; *De Visme v. De Visme*, 1 M'N. & G., 352; *Kester v. Rockel*, 2 Watts & Serg., 365; *Rutledge v. Smith*, 1 McCord Ch., 403; *Stevenson v. Maxwell*, 2 Sandf. Ch., 273; *Hunter v. Bales*, 24 Ind., 299. In a suit for specific performance, brought by the vendor of several tracts of land, each of which was sold separately at auction to the defendant, it appeared that the latter refused to complete his purchase, because the complainant had no title to one of the principal tracts which the defendant alleged was the chief inducement to his entering into the contract. As the asserted object of the purchase was not sustained by proof, the following decree was rendered: "That the complainant do forthwith make, execute, and deliver to the defendant, good and sufficient conveyances for the other tracts in the bill mentioned; and that the defendant do thereupon pay to the complainant the amount of the principal of the purchase money for the same; and, as it is owing to the complainant's own neglect that the contract has not been before complied with, it is further decreed, that the defendant be released from the payment of interest on said purchase money until the time of tendering the title. Lastly, that the costs of the suit be paid by the defendant." *Osborne v. Bremar*, 1 Dessaus Eq., 486. See *White v. Dobson*, 17 Gratt., 262.

the money was tendered and the vendor refused to accept it; because, as the land was covered with timber which had been growing during the whole period of the litigation, the vendee would, upon receiving a conveyance, have the benefit of the growth, which would be equivalent to the rents and profits. It was held that the vendor was not entitled to the interest subsequent to the tender and refusal, unless he could show that the purchaser had made use of the money, or gained some advantage from it, but that the vendor should be allowed for taxes assessed on the land paid by him.¹ When the interest exceeds the rents and profits, and the delay is caused by the vendor, he will not be entitled to interest, but only to the interim rents and profits;² notwithstanding it is agreed that if a conveyance be not executed, and the purchase money paid, by the day named, interest shall run until the purchase is completed;³ unless the stipulation expressly extends to every cause of delay.⁴ Where the interest was considerably more than the rents and profits, it was held that the vendor should be left in possession of them until a good title was shown, and that from that time he would be entitled to interest, and the purchaser to reasonable rents and profits, although, in consequence of the

¹ *Davis v. Parker*, 14 Allen, 94.

² *Paton v. Rogers*, 6 Mad., 236; *Jones v. Mudd*, 4 Russ., 118. In a suit for the specific performance of a contract to convey land which was suitable for making brick, and of no value for anything else, it appeared that after the contract of sale was entered into the vendor conveyed the land to a third person who had knowledge of the previous contract, and who occupied the premises and manufactured brick. It was held that the plaintiff was entitled to interest on the purchase money during the time possession was withheld. *Worrall v. Munn*, 38 N. Y., 137.

³ *Monk v. Huskisson*, 4 Russ., 121, *n.* In New York, as a general rule, in case of failure to perform by the vendor, the vendee is only entitled to nominal damages, unless he has paid part of the purchase money, in which case he is entitled to such money and interest. *Baldwin v. Munn*, 2 Wend., 399; *Peters v. McKeon*, 4 Denio, 546; *Conger v. Weaver*, 20 N. Y., 145; *Mack v. Patchin*, 42 Ib., 167. If, however, the vendor is guilty of fraud, or can convey, but will not, or entered into the contract knowing that he could not convey, or if it is in his power to remedy a defect in his title, and he refuses or neglects to do so, or if he refuses to incur such reasonable expenses as would enable him to fulfil his contract, he is liable to the vendee for the loss of the bargain, under rules analogous to those applied in the sale of personal property. *Margraff v. Muir*, 57 N. Y., 155, per Earl, J.

⁴ *Esdaile v. Stephenson*, 1 Sim. & Stu., 122.

destruction of the buildings by fire, no rents had actually been received.¹ Where the purchaser was not allowed to take possession of the land before the purchase money was paid, and the vendor suffered the land to lie to waste, it was held that the purchaser was entitled to set off against the interest payable by him the amount of rent which might have been received, and the amount of deterioration.² A stipulation that the purchaser shall pay interest from the day fixed for completion whatever may be the cause of delay, will not apply unless the delay arise from mere accident, and not from fraud or negligence on the part of the vendor;³ though it was formerly held otherwise.⁴ If there is no stipulation to the contrary, the vendee is ordinarily liable to the payment of interest from the time of taking possession;⁵ even when the delay is owing to the neglect of the vendor.⁶ This rule, however, though correct in principle, and in the main salutary, cannot always be enforced without hardship to the vendee. In England, where most of the real estate is productive, and the rate of interest adopted by courts of equity, in cases of specific performance, only four per cent., its operation is equable and just. But not so, in all cases, in this country, where a much larger proportion of the land is unproductive, and the rate of in-

¹ Lombard v. Chicago Sinai Congregation, 75 Ill., 271.

² Phillips v. Sylvester, L. R. 8, Ch. 173.

³ Monk v. Huskisson, *supra*; De Visme v. De Visme, *supra*; Robertson v. Skelton, 12 Beav., 363; Sherwin v. Shakspeare, 17 Ib., 267; S. C., 5 De G. M. & G., 517; Vickers v. Hand, 26 Beav., 630; Dean of Durham *ex parte*, 2 Jur. N. S., 345.

⁴ Esdaile v. Stephenson, *supra*; Greenwood v. Churchill, 8 Beav., 413. If the parties were mutually mistaken as to the vendor's title to the land sold, and the vendor, before filing his bill to set aside the sale, made no demand for the surrender of the property, he will only be entitled to rents and profits from the commencement of the suit, and be liable to pay the vendee interest on the purchase money from the same time, and also to pay him for permanent improvements made on the land not exceeding the amount of rents and profits. Irick v. Fulton, 3 Gratt., 193.

⁵ Manning *ex parte*, 2 P. Wms., 410; Smith v. Dolman, 6 Bro. P. C., 291; Blount v. Blount, 3 Atk., 636; Atty. Genl. v. Christ Church, 13 Sim., 214; Cowpe v. Bakewell, 13 Beav., 421; Birch v. Joy, 3 House of Lds., 598; Selden v. James, 6 Rand, 165; Boyce v. Britchett, 6 Dana, 231; Cullum v. Bank, 4 Ala., 22; Oliver v. Hallam, 1 Gratt., 298.

⁶ Fludyer v. Cocker, 12 Ves., 25.

terest higher.¹ It was held in a recent case in England, that where the purchaser exercises acts of ownership over the property, he is liable to the payment of interest on the purchase money pending delay in the completion of the contract, although the delay is occasioned by the vendor, and the land is unoccupied.² In a contract for the sale of a reversion, the wearing away of the life after which the estate will vest in possession, is deemed equivalent to possession, and as creating in the purchaser a liability to pay interest from the time agreed upon for the completion of the contract;³ unless the period for completing the contract is not specified, in which case the interest commences when a good title is shown.⁴

§ 520. *Liability for repairs and losses.*—Where the vendor has received the rents, though not occupying the position of a bailiff at common law, yet if it was his fault that the vendee could not safely take possession, and the rents were allowed to run in arrear, he will be answerable not only for such rents as he received, but also for those he might have received;⁵ but not unless it is shown that he acted otherwise than a prudent owner would have done.⁶

¹ "In the case of a vacant lot, or of wild land, not bought for immediate improvement or cultivation, and where there is no express contract for interest, it would be repugnant to the moral sense to compel the purchaser to pay interest on the price, when, through the default or negligence of the vendor, he had not received a conveyance, and thus had been for years prevented from disposing of the property. Nor would the fact that the buyer had taken all the possession that he could of such property, and had not kept the money by him all the time in order to pay it on receiving the title, affect the natural equity of the case. Yet, by the modern English rule, he would be charged with interest under such circumstances." *Stevenson v. Maxwell*, 2 Sandf. Ch., 302.

² *Ballard v. Schutt*, L. R. 15, Ch. D. 122.

³ *Davy v. Barber*, 2 Atk., 489; *Bailey v. Collett*, 18 Beav., 179; *Wallis v. Sarel*, 5 De G. & Sm., 429. See *Owen v. Davies*, 3 Atk., 637.

⁴ *Enraght v. Fitzgerald*, 2 Dr. & W., 43.

⁵ *Wilson v. Clapham*, 1 J. & W., 36; *Sherwin v. Shakspeare*, 17 Beav., 267; *S. C.*, 5 De G. M. & G., 517. And see *Howell v. Howell*, 2 My. & Cr., 478.

⁶ *Wheeler v. Horne*, Willes, 208. Where the owner of an undivided half of land enters into a contract to convey the whole, the vendee, if he elects to take a conveyance of the vendor's interest, need only pay or tender, as the purchase money, one-half the contract price, and the vendor, in such case, is not entitled to any portion of the rents and profits which accrued subsequent to the making of the agreement. *Marshall v. Caldwell*, 41 Cal., 611.

With reference to repairs, and the sustenance of the premises, these must be borne by the vendor up to the time at which a purchaser can safely take possession, which is the time at which a good title is shown.¹ Although if the completion of the sale has been delayed by the vendor, the court will compel him to make an allowance for any deterioration of the property since the contract, yet he will not be liable for deterioration occurring after the vendee has taken possession, or ought to have done so.² Deterioration caused by the misconduct of the vendor after the contract and while he is in possession, must be paid for by him to the purchaser.³ Accidental loss happening without the fault of the vendor subsequent to the sale, must be borne by the purchaser, and will not therefore be a defence to the vendor's suit for specific performance.⁴ Thus, where the vendor was obliged to expend money in shoring up the property, it was held that he was entitled to have this repaid by the purchaser.⁵ The test which party should bear the consequences of an accidental loss pending a contract of sale is, which was the owner at the time.⁶ A loss to the property which occurs before the vendor is in a situation to give a good title, must be borne by him, and not by the purchaser;⁷ and if a vendor, who is under no obligation to in-

¹ *Carrodus v. Sharp*, 20 Beav., 56. The same principle, under the same circumstances, would throw upon the vendor a loss resulting from the entire destruction of the property.

² *Foster v. Deacon*, 3 Mad., 394; *Lord v. Stephens*, 1 Y. & C., 222; *Binks v. Lord Rokeby*, 2 Swanst., 222; *Minchin v. Nann*, 4 Beav., 332. When by a contract of sale no timber is to be cut until the whole purchase money is paid, the vendee has notwithstanding an equitable right to the timber, which becomes a legal right when he has fulfilled or offered to fulfil the contract, though he or some one else may have wrongfully cut the timber. *Haven v. Beidler Manf. Co.*, 40 Mich., 286.

³ *Foster v. Deacon*, *supra*.

⁴ *Poole v. Shergold*, 2 Bro. C. C., 118; *Cass v. Ruddle*, 2 Vern., 280; *Paine v. Meller*, 6 Ves., 349; *Harford v. Purrier*, 1 Mad., 532; *Thompson v. Gould*, 20 Pick., 134; *Kechnie v. Sterling*, 48 Barb., 330; *Blew v. McClelland*, 29 Mo., 304; *Hill v. Cumberland Valley Mu. Protection Co.*, 59 Pa. St., 474.

⁵ *Robertson v. Skelton*, 12 Beav., 260.

⁶ *Willis v. Culvan*, 107 Mass., 514.

⁷ *Christian v. Cabell*, 22 Gratt., 82. In *Wyvill v. Bishop of Exeter*, 1 Price, 294, *McDonald, C. B.*, said that a court of equity would enforce specific performance without regarding which party might be benefited or prejudiced by unforeseen events where a purchaser had actually accepted the title; but not if

sure, effects an improper insurance, whereby the property is subject to forfeiture, he cannot compel specific performance of the contract.¹ In a contract for the sale of land by A. to B., it was agreed that A. should furnish an abstract of title, and, in case it was not satisfactory, he was to elect to perfect the title, or return the money paid and cancel the contract. A. neglected to show a satisfactory title, or to exercise his option although notified so to do, and he remained in possession. Meanwhile, valuable buildings on the premises having been destroyed by fire, B. brought a suit for specific performance of the contract as to the land, and compensation for the loss, which was decreed.² Timber blown down between the time of signing the contract and the conveyance, will belong to the purchaser; and if the seller cut timber down, he must pay for it, and if it be ornamental timber, the purchaser may be relieved from the contract.³ Any deterioration to the property caused by the vendee, must of course be his loss;⁴ and so if the value of the estate be enhanced or diminished without the fault of either party, the benefit or loss will fall to the purchaser.⁵

the title had not been accepted by him. On the other hand, in *Paine v. Meller*, *supra*, Lord Rosslyn did not consider such acceptance necessary, and he accordingly directed an inquiry whether a good title could be made. In that case, the title was not only objected to as defective, but the property was also subject to a charge for annuities, though a trust of stock had been declared for their payment. The purchaser having waived his objection to the title, and agreed to complete the purchase upon receiving an indemnity against the annuities, before the indemnity was given the premises were destroyed by fire. Lord Eldon, however, refused to decree specific performance, unless it was shown that the purchaser had distinctly accepted the title; and he directed a reference as to the fact of the acceptance. He said: "As to the mere effect of the accident itself, no solid objection could be founded upon that simply. For, if the party, by the contract, has become in equity the owner of the premises, they are his to all intents and purposes. It therefore becomes important, in cases of this sort, to ascertain the period at which the purchaser is to be regarded as the owner. He certainly must be so considered from the date of the bargain, where the vendor is in no default, and is prepared to convey a good title. But if, according to the cases, a court of equity will not compel the purchaser to accept a title which the vendor cannot make out to be clearly good and free from incumbrance, how is the purchaser to be regarded as the owner till these objects are effected, and the vendor is prepared to make the title according to the contract?"

¹ Dawson v. Solomon, 8 W. R., 123.

² Lombard v. Chicago Sinai Congregation, 64 Ill., 477.

³ Magennis v. Fallon, 2 Moll., 584.

⁴ Harford v. Purrier, 1 Mad., 532.

⁵ Sug. V. & P., 820.

§ 521. *Allowance for improvements.*—When a purchaser of land enters into possession, and, on the faith of the contract, makes valuable improvements, but fails to establish such a case as entitles him to specific performance, the bill may be retained for the purpose of allowing him compensation; and, when the amount is ascertained, the court may charge the land with its payment, unless the right of a third person to the land has intervened.¹ Where an alleged contract of sale was not sustained by the evidence, and the vendor was insolvent, the court decreed that the property should be sold, and the proceeds of the sale be first applied to the payment of the money expended by the vendee in improvements, and the balance be paid over for the benefit of the creditors of the vendor; the vendee to be allowed to retain the rents, which, with the concurrence of all parties, had been paid to him when they accrued, as his own.² A party who files a bill to enforce his claim to real estate against a person who in good faith supposing he has a perfect title to the property has made improvements on the land, will be compelled to make due compensation to such person for his improvements.³ This principle of equity is

¹ Aday v. Echols, 18 Ala., 353; Evans v. Battle, 19 Ib., 398; Cox v. Cox, 59 Ib., 591; Pilcher v. Smith, 2 Head, 208; Hilton v. Duncan, 1 Coldw., 313. A. agreed to convey to B. seventy-five acres of a tract of land in consideration of B.'s selling, as A.'s agent, the balance of the tract. This B. nearly succeeded in doing, after the most assiduous efforts, when A. finally himself sold the residue of the tract, and put an end to the contract. It was held that B. was entitled to an apportioned remuneration. To ascertain the amount, the cause was referred to a master to determine what was the fair and ordinary commission for the sale of land in like circumstances in the vicinity; the sum ascertained to be due to be a charge upon the seventy-five acres until paid; in default of which, the court would direct a sale. Williams v. Champion, 6 Ohio, 169. When there is a judgment lien on the land against several co-sureties, including the vendor, and the purchaser pays the judgment, he will be subrogated to the rights of the vendor, and may maintain a bill in equity against the other sureties for contribution. Furnold v. Bank of the State, 44 Mo., 336.

² King v. Thompson, 9 Peters, 204.

³ Green v. Biddle, 8 Wheat., 1. Upon the rescission by the vendee of a parol contract for the sale of land, the compensation to which he is entitled is the enhanced value of the land from the permanent improvements made upon it by him, estimated at the time he elected to avoid the contract, and to be reimbursed the taxes paid by him; but not for insurance incurred while he was treating the property as his own; and he is liable to account for reasonable rents. Masson v. Swan, 6 Heisk, 450.

constantly acted upon where the legal title is in one person who has made improvements in good faith, and the equitable title in another who is obliged to resort to a court of equity for relief. The court, in such cases, acts upon the principle that the party who asks equity must himself be willing to do what is equitable. But whether expenditures made by the vendee in permanent improvements in good faith, and relying upon the performance of the agreement, can be recovered back from the vendor who has failed or been unable to make a good title, or whether they could be made a lien upon the premises in a case where the expenditures were not specified or demanded by the contract, has been questioned. Chancellor Walworth declined to make such an allowance; though he intimated that his decision would have been different if the legal title was in the person who had made the improvements, and the equitable title in another who was thus compelled to resort to equity for relief, and would then himself be required to do equity.¹

¹ Putnam v. Ritchie, 6 Paige Ch., 390. In this case, Chancellor Walworth said: "I have not, however, been able to find any case, either in this country or England, wherein the court of chancery has assumed jurisdiction to give relief to a complainant who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud nor acquiescence on the part of the latter, after he had knowledge of his legal rights. I do not therefore feel myself authorized to introduce a new principle into the law of this court, without the sanction of the legislature, which principle, in its application to future cases, might be productive of more injury than benefit. If it is desirable that such a principle should be introduced into the law of this State, for the purpose of giving the *bona fide* possessor a lien upon the legal title for the beneficial improvements he has made, it would probably be much better to give him a remedy by action at law, where both parties could have the benefit of a trial by jury, than to embarrass the title to real estate with the expense and delay of a protracted chancery suit in all such cases." But in Bright v. Boyd, 1 Story, 478, Judge Story animadverted upon the doctrine as follows: "It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such *bona fide* purchaser, in such a case, where he has manifestly added to the permanent value of an estate by his melioration; and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a *bona fide* purchaser builds a house thereon, enhancing the value of the estate ten times the original value of the land, under a title apparently perfect and complete. Is it reasonable or just that, in such a case, the true owner should recover and possess the whole, without any compensation whatever to the *bona fide* purchaser? To me it seems manifestly unjust and inequitable thus to appropriate to one man the property and money of another who is in no default. The argument, I am aware, is that the moment the house is built, it belongs to the owner of the land by mere operation of law, and that

In a case in the supreme court of the United States, vendees filed a bill for specific performance, the legal title being in the defendants. The contract proved was uncertain as to the person in whom the title was to be vested, and the condition of the conveyance. Specific performance was therefore denied, but the vendees were allowed the benefit of their expenditures, and the premises were directed to be sold to repay them.¹ When expenditures have been made by the vendee, not only in good faith and relying upon the fulfilment of the contract on the part of the vendor, but in direct compliance with the vendee's covenants, the vendor, who is unable to perform the contract, cannot recover possession of the land without remunerating the vendee for his outlay.² Where some improvements had been made by an alleged vendee, not such as an ordinary tenant would be likely to erect, and the defendants in their answer, while denying that the agreement was ever made as claimed, and asserting its invalidity if made, announced that they were ready and willing to contribute their proper share of compensation for said improvements, the court advised a decree that it be referred to a master to ascertain and report what the fair allowance was that would meet in this respect the equity of the case, and that such allowance be made.³

§ 522. *In case of part performance.*—Upon decreeing

he may certainly possess and enjoy his own. But this is merely stating the technical rule of law, by which the true owner seeks to hold what, in a just sense, he never had the slightest title to, that is the house. It is not answering the objection, but merely and dryly stating that the law so holds. But then, admitting this to be so, does it not furnish a strong ground why equity should interpose and grant relief? I have ventured to suggest that the claim of the *bona fide* purchaser, under such circumstances, is founded in equity. I think it founded in the highest equity; and, in this view of the matter, I am supported by the positive dictates of the Roman law."

¹ King v. Thompson, *supra*.

² Gilbert v. Peteler, 38 Barb., 488.

³ Ackerman v. Ackerman, 24 N. J. Eq., 315. A. having entered into a contract with B. to sell him a house and lot in a town, and also a lot in the country, the first being the more valuable, and A. having died, it appeared that the town property in fact belonged to A.'s wife. B. had made permanent improvements on the property, but offered to give up possession. It was held that if an account were taken, the rents and profits up to the time of the decree for the surrender of the property, should be set off against B.'s improvements. Hoover v. Calhoun, 16 Gratt., 109.

specific performance of a verbal contract on the ground of part performance, the court will be governed by the same principles in adjusting the equities of the parties as upon a written contract valid by the statute of frauds; and if the seller is not able fully to comply with the contract, the court will allow the buyer, at his election, to have the contract specifically performed so far as the seller can perform it, with an abatement from the purchase money, or compensation for any deficiency in the title, quantity, or other matters touching the estate.¹ But the court cannot give damages against the defendant for an independent cause of action growing out of a contract void by the statute of frauds. An existing cause of action in equity will not create and secure to the party an independent cause of action which would not exist and could not be enforced but for the equitable action.²

§ 523. *Waiver of objection to jurisdiction.*—The defendant, by not taking the objection by answer that the plaintiff has an adequate remedy at law, waives it in all cases, except those of such purely legal character as that the court, from its peculiar organization, cannot afford relief. Where B. gave A. a bill of sale of a vessel, under an agreement that A. should reconvey on payment by B. of what he owed him, and A., after waiting a reasonable time for the payment of the debt, sold the vessel, it was held in a suit brought by B. against A., for an alleged violation by him of his trust, an objection to the jurisdiction not having been taken by answer, and specific performance being impossible, that the court might give compensation in damages.³

§ 524. *How ascertained.*—The usual mode of determining the amount of compensation or damages in equity is by a reference.⁴ If, however, the case is such as to require

¹ Harsha v. Reid, 45 N. Y., 415.

² Ibid.

³ Tenney v. State Bank, 20 Wis., 152. See McDonald v. Crockett, 2 McCord Eq., 139; Cable v. Martin, 1 How. Miss., 558; Ludlow v. Simond, 2 Caines' Cas., 1.

⁴ Where a reference is ordered to ascertain the amount, the money should be

a jury to assess the damages, or to make that the more appropriate course, it is then a matter of convenience and discretion whether to order such an assessment upon an issue *quantum damnificatus*, or to dismiss the bill and remit the parties to a trial in an action at law.¹ But it is not the practice to direct an issue in any case in which the court can lay hold of a simple, equitable, and precise rule to ascertain the amount which it ought to decree.² Where the contract could not be specifically enforced for the reason that "it was not mutual, fair, just, and reasonable in all its parts," and the complainant was deprived of the benefit of the agreement by the fraud of the defendant, the court decreed a return of the money paid, with interest, without an issue *quantum damnificatus*.³

§ 525. *Measure of damages*.—The measure of damages where the title has failed without the fault of the vendor is the purchase money paid and interest.⁴ If the vendor refuses or puts it beyond his power to convey, it is the difference in the value of the land at the time the contract ought to have been performed, and what was agreed to be paid, if that value exceeds the price mentioned in the contract.⁵

ordered to be brought into court for the party entitled to it. *Stevenson v. Jackson*, 40 Mich., 702.

¹ *Milkman v. Ordway*, 106 Mass., 232, per Wells, J.

² *Pratt v. Law*, 9 Cranch, 494.

³ *Rider v. Gray*, 10 Md., 282.

⁴ *Lockett v. Williamson*, 37 Mo., 388.

⁵ *Dustin v. Newcomer*, 8 Ohio, 49; *Hall v. Delaplaine*, 5 Wis., 206. In the case of an action for breach of contract: "The law regulating the damages to be recovered, makes a distinction between cases where there is a fraudulent breach of contract and those where the breach is occasioned by some unforeseen and unavoidable obstacle. As where one covenants to convey a good title, and it is afterward discovered that he does not possess, and by no means in his power can procure, such a title; or the wife of the covenantor, without any collusion, persuasion, or request on his part, refuses to join in the deed. In cases of this kind, when the covenantor does all in his power to fulfil his contract, and without any fault of his cannot perform it, the damages to be recovered against him are only such actual and immediate losses as he may have suffered, such as the money paid, with interest thereon, the time lost, and expenses incurred in examining the title, conveyancing expenses, and such work or improvements as he may have made upon the land upon the faith of the contract. But where there is a wanton or dishonest refusal to perform the contract, or where the covenantor, by some fraudulent act on his part, renders the performance impossible, as when by collusion with his wife, or by request on his part, she refuses to sign the deed, or where her refusal is not her own free and uncontrolled act, but

Where A. contracted to convey to B., by a quit-claim deed, an undivided share of real estate bound by a judgment against a previous owner, which he failed to do, on a bill filed by B. for specific performance, it was held that an equivalent to the value of the land would not be decreed without providing that B. should first pay or secure his part of the judgment according to the proportion which the share he contracted to purchase bore to the land bound by the judgment.¹ A money compensation, by way of abatement from the price, should be such as to allow the vendee precisely what he has lost by reason of the inability of the vendor to convey the land as agreed; that is, the money and the land conveyed should be equivalent to the land agreed to be conveyed.² A suit was brought to enforce a contract to assign a bond of the State for the conveyance of land situated in another State, against the contractor and two partners residing where the land lay, who took an assignment of the bond and a conveyance of the land with knowledge of the plaintiff's right. After the

made at the implied or actual request of her husband, the law in such a case awards full compensatory damages, and permits a recovery for all the party has lost by reason of the default of the other party, including the value of the bargain and all injury and damage he may have suffered by reason of any act of his made upon the faith of the broken covenant." Clayton, P. J., in *Burk v. Serrill*, 80 Pa. St., 413.

¹ *Woodcock v. Bennett*, 1 Cowen, 71.

² *Harsha v. Reid*, 45 N. Y., 415; *Woodbury v. Luddy*, 14 Allen, 1. In this case the court said: "The plaintiff seeks the aid of a court of equity to compel the specific performance of the defendant's contract to convey land. The defendant is unable to make a perfect title; and the court, at the plaintiff's election, will compel the conveyance of so much as the defendant can convey, and will award compensation in the nature of damages for the deficiency. The defendant has not undertaken to apportion the contract. If he was sued at law, the whole market value of the estate would be the measure of damages. But dividing the estate may very much increase the proportionate damages, without any corresponding advantage to the defendant. By making the election, the plaintiff undertakes to receive what the defendant never agreed to give, namely, a partial conveyance of the estate; and equity will only allow this on the condition that the defendant shall not thereby be subjected to unreasonable injury. The plaintiff in effect elects to take satisfaction, partly in land and partly in money; and if he is allowed to do this, he should only in equity be allowed to receive the fair money value of the part of the estate which is not conveyed to him. In the adjudged cases, though this is sometimes called damages, it is more usually spoken of as an equitable compensation for the value of that which the defendant does not convey." Per Hoar, J.

commencement of the suit one of the partners died. It was held that the plaintiff was entitled either to damages for the value of the land at the time it was conveyed to the partners, or to so much of the land as the surviving partner had a right to convey, and damages for the residue. The plaintiff having decided to take the land in part payment of the damages, died, leaving his real estate to his executors. It was held that they could only recover the land by a bill of revivor; but that they might decline to take the land, and have compensation against both defendants for the share of the surviving partner, and against the contractor for the share of the deceased partner.¹ When the vendor cannot make a good title to the whole he contracted to sell, if the vendee insists on a conveyance of part, he must pay the vendor the value of such part proportioned to the price which was to have been paid for the whole, and not merely in proportion to the number of acres.² Estimating the value of the deficiency at the average price per acre, would, in many cases, be unjust. If there are buildings on the land, the inquiry should be, how much more was agreed to be paid by reason of the supposed additional quantity.³ But if the land contracted for sale is of uniform value, the price per acre would, of course, afford a proper criterion for compensation in case of an excess or deficiency. A. sold to B. all his "lands ly-

¹ *Pingree v. Coffin*, 12 Gray, 288.

² *Jacobs v. Locke*, 2 Ired. Eq., 286; *Chandler v. Geraty*, 5 S. C., 501. But see *Stockton v. Union Oil & Coal Co.*, 4 W. Va., 273.

³ *Wilcoxon v. Calloway*, 67 N. C., 463. If the contract has been in part performed, the benefit received by the complainant from such part performance will be allowed in estimating the damages. *Taylor v. Reed*, 4 Paige Ch., 561. As a general rule, when a person can only partially perform a contract into which he has entered, he must respond in damages to the extent of the difference in value between that which the other party receives and that to which the contract entitled him. And this is found by taking the market value of the whole subject of the contract. *Wetherbee v. Bennett*, 2 Allen, 428. But this rule is not universal; and, in the case of an incumbrance, or an estate conveyed with covenants of warranty, the more usual measure of damages for the breach of the covenant against incumbrances has been the market value of the incumbrance, where this was capable of an exact estimate. *Eastbrook v. Hapgood*, 10 Mass., 315.

ing on the Miami River, one thousand five hundred and thirty-three and one-third acres, as by patent in my (his) name." A subsequent survey showed the tract to contain eight hundred and seventy-six acres in excess of the quantity named. The heirs of the vendee having filed a bill for specific performance of the contract of sale, the court decreed a conveyance of the excess to the vendee on his paying for the same at the average rate per acre with interest which the consideration mentioned in the contract bore to the quantity of land there mentioned.¹

¹ King v. Hamilton, 4 Pet., 311.

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